No.

In The

Supreme Court of the United States

October Term, 1995

ROBERT C. McFARLANE,

Petitioner,

vs.

ESQUIRE MAGAZINE, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. In a case governed by *New York Times v. Sullivan*, does a publisher act with actual malice when it publishes without corroboration highly defamatory accusations of an informant the publisher acknowledges is a liar?

2. In a case governed by *New York Times v. Sullivan*, can a publisher avoid a finding of actual malice by claiming that it trusts a reporter who has relied upon an acknowledged liar, when the publisher knows that the reporter has no independent corroboration for the liar's statements?

3. In a case governed by *New York Times v. Sullivan*, does a publisher act with actual malice when it advocates the believability of an untruthful informant, and fabricates and suppresses material information which could lead a reader to discredit the publisher's endorsement?

4. Is the *New York Times v. Sullivan* standard so purely subjective that admitted review of information showing a publication's falsity will not constitute actual malice unless the publisher confesses to his thoughts concerning the material?

5. In a case governed by *New York Times v. Sullivan*, may a court disregard evidence of actual malice through a weighing of evidence the court acknowledges would support a conclusion of recklessness?

6. Can a publisher be liable under *respondeat superior* for defamatory statements concerning a public figure made with actual malice by a writer "assigned" by the publisher to "cover" a story, when the publisher edits, approves and shapes the defamatory product?

7. Should the actual malice requirement of *New York Times v. Sullivan* be reexamined, when its "daunting" standard allows the publication of defamatory falsehoods invented by an acknowledged liar?

8. The Court of Appeals for the District of Columbia Circuit constructed DC Code § 13-423(a)(3) as separating the "act" of libel from the "injury" it causes. Is the separation of "act" from "injury" for the tort of libel inconsistent with *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), which recognized that the tort of libel occurs "wherever the offending material is circulated," and based upon an impermissible extension of procedural safeguards to protect First Amendment rights in violation of *Calder v. Jones*, 465 U.S. 783 (1984)?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court of Appeals are:

Petitioner Robert C. McFarlane resides in the District of Columbia. McFarlane was plaintiff in the district court and appellant in the United States Court of Appeals for the District of Columbia Circuit.

Respondent Esquire Magazine is an unincorporated business with its principal place of business in New York City. Esquire was a defendant and appellee below. Respondent the Hearst Corporation is a Delaware corporation with its principal place of business in New York City. Hearst owns and publishes Esquire, and was a defendant and appellee below. Esquire and Hearst will be referred to collectively as "Esquire."

Respondent Craig Unger resided in New York City at the time the suit was brought. Unger was a defendant and appellee below.

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The opinion of the United States Court of Appeals for the District of Columbia Circuit is published at 74 F.3d 1296; the district court's opinion is published at 22 Media L. Rep. 2033, and is found at 1994 WL 510088.

STATEMENT OF JURISDICTION

1. The Court of Appeals rendered its decision on January 30, 1996.

2. Jurisdiction to consider this petition exists under 28 U.S.C. § 1254(1).

3. The District Court had original jurisdiction to consider the matter under 28 U.S.C. § 1332. The Court of Appeals had appellate jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

In *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964), this Court held the First Amendment to mean:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement

> was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

STATEMENT OF THE CASE

I. The Facts

Facts material to this petition are, for the most part, in the Court of Appeals' opinion.

A. October Surprise and Its Falsity

In the late 80's and early 90's, articles appeared in the American Press asserting an "October Surprise" — a scheme by members of the 1980 Reagan-Bush campaign team to thwart President Carter's efforts to negotiate the release of Iran's American hostages by inducing the Iranians to delay their agreement. Ultimately (in January 1993) a bipartisan task force of the House of Representatives emphatically rejected these claims. *See Joint Report of the Task Force to Investigate Certain Allegations Concerning the Holding of American Hostages by Iran in 1980*, H. Rep. No. 102-1102 (102d Cong., 2d Sess.) ("Task Force Report"). Opinion at 2.

B. The Defamatory Article

In the meantime, however, Unger wrote and Esquire published an article sketching out the conspiracy theory in lurid terms. The magazine's October 1991 cover asked, "Did the Republicans conspire with Iran and Israel to delay the release of the hostages and steal the 1980 presidential election?" The article's answer appeared to be a qualified Yes. Opinion at 2. But any qualification was muted; the article's lead stated: "[W]hat

matters is that covert action took place that sabotaged our government."

"In a breathless and kaleidoscopic account rivaling an Oliver Stone movie," Unger writes that McFarlane, while an aide to Senator Tower, attended a February 1980 meeting with Iranian officials in Teheran — a meeting that "helped set up later meetings in Madrid, which in turn paved the way for the crucial October rendezvous in Paris." In the "October rendezvous" George Bush and William J. Casey are supposed to have closed the deal by which Iranians stalled hostage negotiations in exchange for promises of arms. The Task Force Report found that the records and testimony "conclusively prove candidate George Bush's whereabouts in October 1980," and that he did *not* travel to Paris in the period alleged. It is not said just how the February meeting "helped set up" later meetings (or how those "paved the way" for the supposed climax in Paris), but in the course of the account the defendants used language effectively calling McFarlane an Israeli spy. The article quotes from Ari Ben-Menashe, a self-professed former Israeli spy and a major source for conspiracy theorists:

> In February 1980, Ben-Menashe says, Robert "Bud" McFarlane, then an aide to Senator John Tower, and Earl Brian, a businessman who had been secretary of health in Reagan's California cabinet, met highly placed Iranian officials in Teheran. In a sworn affidavit submitted by Elliot Richardson on behalf of one of his clients, a computer-software company called Inslaw, Ben-Menashe states that both McFarlane and Brian had a "special relationship" with Israeli intelligence, McFarlane having been *recruited* by Rafi Eitan, a legendary Israeli

agent who was the model for a leading character in John LeCarre's *Little Drummer Girl*. "*McFarlane was the famous Mr. X in the Pollard case,*" adds Ben-Menashe, referring to the trial of Jonathan Pollard, an American convicted of spying for Israel. In Pollard's case there were persistent allegations about *another, unnamed American who secretly worked for the Israelis.*

Both McFarlane and Brian have declined comment.

McFarlane and Brian's visit, Ben-Menashe says, helped set up later meetings in Madrid, which in turn paved the way for the crucial October rendezvous in Paris.

Opinion at 2-3.

C. Esquire's Acknowledged Doubts About the Credibility of Its Sole Source, Ari Ben-Menashe

Ben-Menashe is the source for many of the details in *October Surprise*, including the ones in the passage under attack in this case. Several of Unger's sources made clear to him their belief that Ben-Menashe was a liar, and Esquire does not deny its awareness of these views; it couldn't, as the article passed a substantial chunk of them through to the readers. The article directly quotes a former CIA officer and a Washington Post journalist as calling him, respectively, a "liar" and a "con man." It notes that when he took a lie detector test he "failed miserably," and it quotes an ABC News producer as saying that in the lie detector test Ben-Menashe "goes way off the chart on all relevant

questions. My theory is that a lot of what he says is true, but that Ari exaggerates his own role and muddies the water." Opinion at 12-13.

D. Esquire Advocates Ben-Menashe's Credibility

The Esquire article advocates Ben-Menashe's credibility. After disclosing that "*some* intelligence figures and journalists in the U.S. and Israel say Ari Ben-Menashe is a fake," the article continues:

> Yet it's almost impossible to dismiss him. . . . [F]ormer attorney general Elliot Richardson, a staunch Republican who emerged as the moral hero of Watergate after he refused President Nixon's order to fire Special Prosecutor Archibald Cox and resigned instead, has submitted sworn affidavits by Ben-Menashe on behalf of a client. A standard legal gambit, perhaps, but Richardson finds Ari Ben-Menashe a compelling witness. "I take him seriously as being who he says he is," says Richardson.

Esquire's press release touted:

> "Compared to the October Surprise," says former attorney general Elliot Richardson, "Watergate was an innocent child's frolic."

Throughout the article, the truth of the *October Surprise* conspiracy is championed. The first page proclaims in large type: "Eleven years ago this month, while no one was watching, the CIA and the Reagan-Bush campaign may have committed an act of highest treason. Did they plot to delay the release of the

hostages from Iran and steal a presidential election? A tale of international conspiracy and double-dealing." The article asserts:

- One can almost make a prima facie case that surreptitious deals did take place.

- Lay their stories on top of one another like the anatomical transparencies in a medical textbook and you have a shocking picture of a body politic diseased with corruption at the highest level.

- Granted, it would have been horrific to arm Iran as a reward for prolonging the imprisonment of Americans. But more appalling is the likelihood that the CIA helped engineer the whole thing.

- And yet, after more than 150 interviews with sources in and out of the government, and after reviewing thousands of pages of records, I believe a compelling case can be made that in 1980, this country experienced its first and only coup d'etat and never knew a thing.

- "Compared to the October Surprise," says former attorney general Elliot Richardson, "Watergate was an innocent child's frolic."[1] Here's how it happened.

- "October Surprise" also displays color

1. Esquire's reviewed Unger's Richardson interview, where Richardson said he knew nothing about October Surprise, and compared Watergate to his hobby horse, Inslaw.

photographs of presidents Reagan and Bush along side pictures of the Ayatollah Khomeni and Ben-Menashe as "co-conspirators."[2]

E. The Fabricated Endorsement of Ben-Menashe's Credibility

The claim that McFarlane was an Israeli spy, McFarlane's supposed participation in the *October Surprise* conspiracy, and the believability of *October Surprise*, all depend upon Ben-Menashe being believed. Ben-Menashe's believability depends upon the endorsement of Elliot Richardson, whom the article dubs the "moral hero of Watergate."

First, the article conveys that a Richardson-filed and endorsed affidavit of Ben-Menashe accuses McFarlane both of having been "recruited" by Israeli intelligence, and also of being the "Mr. X" for convicted spy Jonathan Pollard. As the Court of Appeals recognized, the statement has a "serious flaw." "Its latter part, beginning with 'McFarlane having been *recruited* by Rafi Eitan,' is not in the affidavit. Nor indeed is there anything in the affidavit remotely supporting the statement in the article's following sentences, making McFarlane out to be an equivalent of Pollard — a spy who pled guilty to, in effect, selling masses of top secret U.S. material to the Israelis." Opinion at 16.

Second, the article quotes Richardson as saying:

> And former attorney general Elliott [sic] Richardson . . . has submitted affidavits by Ben-Menashe on behalf of a client. A

2. Before pictures were set in page proofs, Esquire's personnel wrote: "Caption goes here about all these people and how they destroyed our remaining faith in the government."

> standard legal gambit, perhaps, but Richardson finds Ari Ben-Menashe a compelling witness. "I take him seriously as being who he says he is," says Richardson.

Unger's earlier draft has Richardson saying: "Quite apart from what he knows, I take him seriously as being who he says he is." Unger's notes, which Esquire's editors reviewed, quote Richardson:

> Ben-Menashe is who he says he is and he does know alot, quite apart from what he says about the October dealings. One thing that is true of people like him is that they live in a world of such constant deception that they are used to moving without misstep between truth and fabrication. So he doesn't help much with the October Surprise story to verify the truthfulness.

Esquire's editors removed the qualification, "Quite apart from what he knows," from Unger's draft, Opinion at 17-18, and conveyed that Richardson was vouching for Ben-Menashe as a source knowledgeable about the October Surprise. Unger's notes also quote Richardson as saying:

> I don't have any firm views on the credibility of Ben-Menashe.
>
> We used his affidavit for what it is worth, because it lent color to our need for discovery.
>
> I can't tell if the son of a bitch is telling the truth.

> If what he says about McFarlane is true, I have no idea.
>
> If October Surprise happened it was despicable; whether it happened, I don't know.
>
> Inslaw . . . Watergate was an innocent child's frolic compared to this.

Unger's uncontradicted testimony is that he gave Esquire a draft of *October Surprise* with Richardson being quoted as saying, "I can't tell if the son of a bitch is telling the truth." Opinion at 18. The editors removed it, with the purpose, according to Unger, of "maintaining the integrity of what Mr. Richardson said." The Court of Appeals observed that "This appears to be some sort of jargon for suppressing material inconsistent with a broad effort to build up Ben-Menashe's credibility." Opinion at 18.

F. The False Report of McFarlane's Refusal to Comment

In the last stages of editing, Esquire changed the article's treatment of McFarlane's response to the charges. "McFarlane . . . denied the charges" became "McFarlane . . . refused comment." Opinion at 19.

Unger had written a letter to McFarlane, requesting an interview. "There was not a clue [in Unger's letter] as to the depths of the charges ('By the way, I plan to accuse you of being an Israeli spy.')" Opinion at 19. McFarlane replied the same day saying that he had no way of knowing if the assertions were true, and would be "of little help." Esquire's editors saw Unger's letter and McFarlane's response.

II. The Court of Appeals' Opinion

The Court of Appeals affirmed a summary judgment for Esquire based upon its conclusion that McFarlane had not shown actual malice with the necessary clear and convincing evidence. The court affirmed a dismissal of McFarlane's claims against Unger for lack of personal jurisdiction. The key elements of the court's opinion are the following:

A. The Acknowledgement Shield

The court created a novel "acknowledgement shield" which held that "full (or pretty full) publication of the grounds for doubting a source tends to rebut a claim of malice, not to establish one." Opinion at 13. The court disclaimed: "We are not, of course, saying that one may altogether shield a defamation simply by including the source's reputation as a liar." Opinion at 13. However, the Court does not suggest when acknowledgment that a source is a liar would not be a shield.

The acknowledgement shield protects even a publisher which advocates the believability of an untruthful informant, and omits and suppresses material information which could lead a reader to discredit the publisher's endorsement. Esquire advocated Ben-Menashe's believability (against the disclaimers) in large part based on the endorsement of Elliot Richardson, "moral hero." But Richardson told Unger, and Unger wrote, "I can't tell if the son of a bitch [Ben-Menashe] is telling the truth." Esquire editors removed the language, "suppressing material inconsistent with a broad effort to build up Ben-Menashe's credibility." Opinion at 18. The court found this active deception shielded by the acknowledgement that Ben-Menashe is a liar:

> Still, in view of the article's inclusion of solid material damning Ben-Menashe, the removal gets only limited weight.

Opinion at 18.

B. The Trusted Reporter Shield

The Court of Appeals also created a novel "trusted reporter shield," which immunizes the publication of a known liar's accusations, if they are filtered through a "trusted reporter," even though the reporter has done nothing to corroborate the liar's story. The court stated:

> And the editors relied on Unger's record; he had worked with Esquire editor David Hirshey on two earlier pieces, and Hirshey had found him "exemplary." Reliance on a reporter's reputation can indeed show a lack of actual malice by a publisher.

Opinion at 13. However, Esquire's editors knew that Unger was relying upon Ben-Menashe for the defamatory statements concerning McFarlane; they knew that Ben-Menashe was a liar; and they knew that Unger had no corroboration for Ben-Menashe's statements.

C. Ignoring the Creation of Ben-Menashe's False Pedigree

The Court of Appeals discusses, but then ignores, that Esquire "artificially boosted Ben-Menashe's credibility, fabricating a 'pedigree' for him with quotations from Elliot Richardson — referred to in the article as the 'moral hero' of Watergate — purporting to show that Richardson took Ben-Menashe seriously." Opinion at 15. Although the court seemed

to recognize that Richardson's supposed endorsement is central to the effort at persuading readers to believe a liar, and although the court recognized ways in which the endorsement was fabricated, the court refused to accept the fabricated endorsement as constituting actual malice.

D. The Shield of Confession

The Court of Appeals treated the actual malice standard as being radically subjective, as requiring an act of confession as a predicate for liability.

The Court of Appeals admitted to being "troubled" by evidence which showed that Esquire's editors drafted language conveying that Elliot Richardson vouched for Ben-Menashe as a source knowledgeable about the October Surprise, when they reviewed documents in which Richardson told Unger that Ben-Menashe knew nothing about October Surprise. The same documents revealed that Richardson did not know if Ben-Menashe was telling the truth, and did not know if Ben-Menashe's statements about McFarlane were true. Opinion at 17-18. Nevertheless, the Court found no evidence of actual malice because Esquire's editors did not confess to being troubled themselves:

> As Esquire put most of its eggs in the Ben-Menashe basket, both for October Surprise generally and for the accusation against McFarlane, this seems a sharp renunciation of its star witness by his putative champion. The statement is in Unger's notes of his talks with Richardson, and it is undisputed that Mark Warren browsed in precisely those notes. But at no time, so far as we can tell, did McFarlane's counsel ever ask Warren whether he'd spotted this passage and, if so,

> what he made of it. Accordingly, its presence, though puzzling, cannot much help McFarlane.

Opinion at 18.

Actually, Editor Warren was asked about his review of Unger's notes. He stated, in what a reasonable jury could find (consistent with *St. Amant v. Thompson*) to be an absolute falsehood:

> THE WITNESS: My review of those transcripts indicated that he, Elliot Richardson, saw Mr. Ben-Menashe as knowledgeable and took him seriously.

E. Weighing of Evidence

Throughout its opinion, the Court of Appeals weighed the evidence, assessed the credibility of the Esquire witnesses, drew all inferences from disputed facts in Esquire's favor, and found "not enough" to show actual malice, even in facts which "troubled" the court.

1. False Description of the Affidavit

First, the Court of Appeals acknowledged and dismissed the undisputed fact that Richardson did not "submit" the Ben-Menashe affidavit as a statement only "technically false." Opinion at 15. A jury might reasonably place importance on the assertion that Richardson submitted the affidavit — not that "he was on a legal team for Inslaw." Opinion at 15. *See Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 124 (1989). A reasonable juror might conclude that a lawyer who actually submits a sworn affidavit vouches for it more personally than an anonymous member of a "legal team."

Second, the court acknowledges that the description of the affidavit conveys the impression that the sworn document accuses McFarlane of being a spy in two ways, when the affidavit itself makes no such accusation. The court dismisses Esquire's explanation for the "recruited" accusation as "fanciful." The court also recognizes that Esquire's explanation for the "Pollard Mr. X" accusation is "pretty thin." Nevertheless, the court weighs against finding actual malice:

> Esquire offers two answers. First, it argues that there is "no material difference" between the "recruited by" and "special relationship" phrases. This is fanciful. "Special relationship" seems infinitely elastic, while "recruited," in context, suggests a switch of allegiance to a foreign power. Second, Esquire's editors testified that they recognized that the passage might appear to suggest that the whole accusation was in the affidavit, but that they ordered changes — their recollection was that addition of the comma — to indicate the contrary. . . .[3] Although we find the comma theory pretty thin, this imprimatur stretch seems as consistent with linguistic muddle as with reckless disregard, and in context not enough, even in conjunction with other evidence, to show actual malice by Esquire editors.

Opinion at 16.

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3. Editor Hirshey testified, "[T]here's a comma in here that *suggests* that it's not from the same source."

The court does not explain how a "fanciful" explanation for a false charge of espionage can be overcome by a "thin" "imprimatur stretch" of a *second* charge of espionage. Nor does the court explain how or on what basis it ignored Esquire's admitted recognition that a reader could understand the article to be saying that both claims of espionage (both "recruited" and "Mr. X in the Pollard case") were in the affidavit. The court gives not a clue as to what "context" could possibly justify these fabrications.

2. *Falsification of Richardson's Supposed Endorsement of Ben-Menashe's Knowledge*

Without Richardson's endorsement, there is no reason for a reader to believe Ben-Menashe or his story. As the Court of Appeal recognized, "Esquire put most of its eggs in the Ben-Menashe basket." The "Richardson endorsement" is the cornerstone of Esquire's star witness. Opinion at 18.

Even though the endorsement is false, and though the Court recognized that Esquire ignored Richardson's disavowal of Ben-Menashe, and then changed Unger's quotation of Richardson's statement to make it more misleading, the Court accepted as credible an Esquire's explanation which a reasonable jury could surely reject:

> Nonetheless, we think the explanation by Esquire — that they deleted the clause because of space considerations[4] and because of ambiguity — altogether plausible. "Quite apart from what he knows"

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4. Nearly half the page before Richardson's supposed quotation is filled with a picture of a sexily dressed woman. A jury might ask, why not quote Richardson truthfully, and show less cleavage?

> could be taken to mean that Richardson believed Ben-Menashe's claimed identity but not his statements, or it could mean that Richardson wanted to emphasize his belief in Ben-Menashe's identity, not simply Ben-Menashe's apparent knowledge. The clause *is* ambiguous. And with or without it this Richardson endorsement seems to add up to very little.

Opinion at 17. The court did not explain how a statement denoting Ben-Menashe's "apparent knowledge" could be other than actually false, when Esquire's editors knew that Richardson had no belief in Ben-Menashe's knowledge or truth telling.

Even though the Court of Appeals recognized the disingenuity of the explanation for Esquire's removal from the article of Richardson's statement, "I can't tell if the son of a bitch is telling the truth," the court gave the evidence only "limited weight."

> The editors apparently removed it, with the purpose, according to Unger, of 'maintaining the integrity of what Mr. Richardson said.' This appears to be some sort of jargon for suppressing material inconsistent with a broad effort to build up Ben-Menashe's credibility. Still, in view of the article's inclusion of solid material damning Ben-Menashe, the removal gets only limited weight.

Opinion at 18.

3. Fabrication of the Statement That McFarlane Refused to Comment

In the last stages of the editing process, Esquire's editors changed the article's treatment of McFarlane's response to the charges. "McFarlane . . . denied the charges" became "McFarlane . . . refused comment." Esquire was plainly conveying that McFarlane was declining to comment upon the accusation that he was an Israeli spy. Esquire knew that Unger had never told McFarlane he would be accused of being a spy. The court weighed this is being only "very careless":

> McFarlane notes that Unger's letter requesting help from McFarlane was phrased very blandly, saying that he was about to do an article on the October Surprise and asking for an interview. There was not a clue as to the depths of the charges ("By the way, I plan to accuse you of being an Israeli spy.") And Mark Warren acknowledged having seen a copy of the letter to McFarlane, and the latter's reply, in the editing process. In a later telephone call, according to McFarlane's executive assistant, Unger mentioned October Surprise and Inslaw, but, again, not a word about espionage. Thus Warren and Esquire were on some notice of what had led to McFarlane's position. In retrospect, this looks at least very careless, but not enough to entangle Esquire in Unger's apparent misleading, which would be necessary for Esquire's behavior to help show actual malice on its part.

Opinion at 19-20.

F. Refusal to Attribute Unger's Actual Malice to Esquire

The Court of Appeals found Esquire not liable for Unger's misleading because Unger was not an employee of the magazine. The court recognized that the issue is unsettled, and expressed some considerable doubt about its holding. Opinion at 10-11.

G. Dissection of Speech from Hearing

The Court of Appeals followed its earlier *Moncrief v. Lexington Herald-Journal Co.*, 807 F.2d 217 (D.C. Cir. 1986), in which it pronounced that the "act" of libel occurs only where the libel is written or spoken. The court observed that it is without power to overrule *Moncrief*, even if it thought it desirable to do so. Opinion at 5.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DISCLOSURE SHIELD CONFLICTS WITH *ST. AMANT v. THOMPSON* AND RAISES A BASTARDIZED VERSION OF THE NEUTRAL REPORTAGE DOCTRINE TO CONSTITUTIONAL STATUS.

In *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), this Court observed that reliance upon an untruthful informant is actual malice, even if the publisher professes good faith. The Court of Appeals has sidestepped this rule, and created a novel immunity for a defendant who discloses that the source is a liar. This acknowledgement shield appears to be a backdoor adoption of the neutral reportage doctrine as a rule of constitutional law, in a case where the neutral reportage doctrine would not apply.

The neutral reportage privilege originated in the Second Circuit with *Edwards v. National Audubon Society, Inc.*, 556 F.2d

113 (S.D.N.Y. 1977), *cert. denied*, 434 U.S. 1002 (1977), and was further explained in *Ciani v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980). "The neutral reportage privilege will not apply to a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure." In such instances he assumes responsibility for the underlying accusations. *Edwards v. National Audubon Society, Inc., supra*, 556 F.2d at 119.

The neutral reportage privilege would not apply to "October Surprise" because the article is not neutral. There should be no constitutional privilege to advocate the accusations of an acknowledged liar.

II. THE COURT OF APPEALS' TRUSTED REPORTER SHIELD ALSO CONFLICTS WITH *ST. AMANT v. THOMPSON*, AND INVENTS A NOVEL METHOD TO ESCAPE LIABILITY FOR PUBLISHING STATEMENTS OF A KNOWN LIAR.

St. Amant v. Thompson recognized that a defendant in a defamation action brought by a public figure cannot avoid liability simply by pronouncing that he published in good faith, particularly where there are reasons to doubt the accuracy of the informant. 390 U.S. at 732. The Court of Appeals sidestepped this rule, by creating a privilege to publish doubtful accusations so long as they are filtered through a trusted reporter. The privilege applies even when the trusted reporter also knows that the source is a liar, and has done nothing to corroborate the doubtful information.

There should be no constitutional privilege to publish doubtful information of a known liar, just because it is porously filtered.

III. THE COURT OF APPEALS' OPINION CONFLICTS WITH *ST. AMANT v. THOMPSON* AND *MASSON v. NEW YORKER MAGAZINE* BY ALLOWING THE FABRICATION OF AN ENDORSEMENT OF BEN-MENASHE'S CREDIBILITY.

In *Masson v. New Yorker Magazine*, 501 U.S. 447, 517 (1991), the Court recognized what should have been obvious: "Meaning is the life of language." "[Q]uotations may be a devastating instrument for conveying false meaning." "Where . . . a writer uses a quotation, and where a reasonable reader would conclude that the quotation purports to be a verbatim repetition of a statement by the speaker, the quotation marks indicate that the author is not involved in an interpretation of the speaker's ambiguous statement, but attempting to convey what the speaker said." 501 U.S. at 519. The point is the attempt to convey what the speaker said. As every reader of English since Joyce and Faulkner recognizes, quotation marks are not the only way of conveying to a reader that words are being attributed to someone.

Where a defamatory story's star witness is a liar, and is advocated as being believable based upon the testimonial of a "moral hero," a "sharp renunciation" of the witness by his "putative champion" is material. Altering and omitting material "quotations" in such a case, "may be a devastating instrument for conveying false meaning."

By ignoring the way in which Esquire changed the meaning of Richardson's purportedly filed affidavit, and altered the meaning of Richardson's remarks about Ben-Menashe's knowledge of October Surprise, the Court of Appeals ignored *Masson*. The court fashioned a novel way for publishers to immunize themselves from liability for attacking public figures with doubtful charges made by known liars.

IV. THE COURT OF APPEALS' CONFESSIONAL SHIELD, AND RULE OF ABSOLUTE SUBJECTIVITY, CONFLICTS WITH *ST. AMANT v. THOMPSON*.

In *St. Amant v. Thompson*, this Court recognized that a defendant should not be entitled to immunity just because he testifies that he published defamatory material in good faith. 390 U.S. at 732. The Court of Appeals sidestepped this rule, and invented a new immunity under which liability will attach only if a publisher confesses that he did not publish in good faith, even where there is *objective* evidence of fabrication.

Richardson told Unger, and Unger showed Esquire, that Richardson said Ben-Menashe "doesn't help much with the October Surprise story to verify the truth." Editor Warren "browsed in precisely those notes." But because Warren did not confess to "what he made of" the notes, the evidence of fabrication "cannot much help McFarlane." Opinion at 18. The Court of Appeal's confessional shield is the most radical of its extensions of the *New York Times v. Sullivan* doctrine: it would provide absolute immunity for all defamation, except to the mythic publisher willing to confess to a conscious awareness of falsehood — a creature not to be imagined even in any of Plato's caves.

V. THE COURT OF APPEALS' WEIGHING OF THE EVIDENCE CONFLICTS WITH *ANDERSON v. LIBERTY LOBBY*.

Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986), reaffirmed that the rules governing summary judgment apply to public figure libel cases:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate

> inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

The Court of Appeals disregarded *Anderson*, and engaged in wholesale weighing of evidence and credibility. In every instance where a reasonable juror could draw an inference of actual malice (even where the Court of Appeals specifically recognized that such an inference could reasonably be drawn), the court weighed the evidence in Esquire's favor.

- Although Esquire's argument that there is "no material difference" between the "recruited by" and "special relationship" phrases is rejected as "fanciful," the Court of Appeals found no actual malice in the fabrication.

- The Court of Appeals acknowledged that Esquire's editors knew the article could convey that the affidavit Richardson purportedly filed accused McFarlane of being Mr. X in the Pollard spy case. Nevertheless, the Circuit accepted the "pretty thin" "comma theory" which it characterized as an "imprimatur stretch" because it determined it to be "as consistent with linguistic muddle as with reckless disregard."

- Although "Esquire saw Unger's notes, and they speak for themselves," the Circuit refused to find actual malice in the falsification of a endorsement because Esquire's editor did not

confess to a subjective awareness of the obvious falsehood in front of him.

- The Circuit weighed as "ambiguous" and no evidence of actual malice the manufacture of a quotation conveying that Ben-Menashe should be trusted about October Surprise from a statement that Ben-Menashe knows alot, quite apart from what he says about October Surprise.

- Esquire's explanation for suppressing Richardson's statement, "I can't tell if the son of a bitch is telling the truth" was "maintaining the integrity of what Mr. Richardson said." The Circuit recognized this "to be some sort of jargon for suppressing material inconsistent with a broad effort to build up Ben-Menashe's credibility." Yet, the Circuit gave this fabrication "only limited weight."

From any standpoint other than a bias toward absolute immunity for the libel of public figures, it is difficult to imagine a reasonable juror agreeing with the Court of Appeal's assessment of the evidence.

VI. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE EXTENT TO WHICH A PRINCIPAL CAN BE LIABLE FOR THE ACTUAL MALICE OF ITS AGENT IN A PUBLIC FIGURE LIBEL CASE.

Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974) held that a publisher with no actual knowledge of any inaccuracies in an article could nevertheless be found vicariously liable for the actual malice of a feature writer. Although the writer was a staff writer for a newspaper owned by

the publisher, the false article (which placed the plaintiffs in a "false light") was published in a magazine the publisher also owned, and to which the writer did not regularly contribute. This Court concluded:

> Eszterhas frequently suggested stories he would like to write for the magazine. When Eszterhas suggested the follow-up article on the Silver Bridge disaster, the editor approved the idea and told Eszterhas the magazine would publish the feature if it was good. From this evidence, the jury could reasonably conclude that Forest City Publishing Co., publisher of the Plain Dealer, should be held vicariously liable for the damage caused by the knowing falsehoods contained in the Eszterhas' story.

The circuits and district courts are confused and in disagreement about the scope of agency liability under the actual malice standard. *Gertz v. Robert Welsh*, 680 F.2d 527, 539, n. 19 (7th Cir. 1982) held that agency liability could exist where a writer was "solicited to write this specific article, was given the story line and background material, was reimbursed for his expenses, and kept in contact with [the editor] during the preparation of the article." *Price v. Viking Penguin, Inc.*, 881 F.3d 1426, 1446 (8th Cir. 1989) refused to find actual malice under an agency theory where "Viking played only a limited role in the story's development" and "undertook no factual review." *Masson v. New Yorker Magazine*, 832 F.Supp. 1350, 1373 (N.D. Cal. 1993) viewed *New York Times v. Sullivan* as prohibiting liability based upon an agency theory. The Court of Appeals in this case admitted to confusion, but ultimately held that actual malice could not be shown through an agency theory. Opinion at 11.

Cantrell does not prevent agency principles from establishing liability under the actual malice standard. There is as much reason for holding Esquire liable for Unger's conduct as for holding Forest City Publishing liable for Eszterhas. Esquire knew that Unger represented to McFarlane, "I am a reporter who has been assigned by Esquire Magazine to cover the so-called 'October Surprise.' " Originally, Unger was going to write about Donald Gregg, until Esquire changed the assignment. Esquire not only edited the article, but shaped it, drafting much of the language which advocated the believability of the accusations.

VII. CERTIORARI SHOULD BE GRANTED TO RE-EXAMINE *NEW YORK TIMES v. SULLIVAN.*

The Court of Appeals interpreted the actual malice standard as protecting publication of defamatory falsehoods against a public figure by a notorious liar. The court protected the advocacy of the liar's accusations through a fabricated endorsement of a moral champion. Society can no longer afford the eccentric interpretation of the law which led to such an outrage.

New York Times v. Sullivan, 376 U.S. 254 (1964) invented the actual malice standard as a way of protecting freedom of the press under the First Amendment. The Court believed that false statements about public figures should be protected unless made with actual malice, because economic punishment for falsehood might threaten an informed citizenry, essential to our democracy. The untested assumption was that the press would stop criticizing public officials if it was forced to pay the economic cost of carelessness. A rule which has the effect of immunizing falsehood can be seen as designed to redistribute wealth at the behest of one powerful interest group (the press) at the expense of others. *See* George J. Stigler, *The Citizen and the State: Essays on Regulation* (1975); Gary S. Becker, "Pressure Groups and Political Behavior," in *Capitalism and Democracy:*

Schumpter Revisited 120 (Coe and Wilbur eds. 1985); Joseph P. Kalt and Mark A. Zupan, "Capture and Ideology in the Economic Theory of Politics," 74 *American Economic Review* 279 (1984); Richard A. Posner, *Sex and Democracy* 215 (1992).

The marketplace has a way of working its magic. Where economic incentives regulating behavior are removed, market forces will nevertheless find ways to direct behavior. The press has paid the cost of carelessness by a steady devaluing the press since the *New York Times* decision. James Fallows' recent *Breaking the News, How the Media Undermine American Democracy* (New York, 1996), pp. 1 and 7, observes that each year in the past decades, fewer Americans read newspapers or watch news programs on TV. Fallows blames this primarily upon the press's unrelenting negativity concerning public officials.[5]

Freedom of the press is illusory if Americans stop believing the press. Rather than being a cornerstone of democracy, a lying press — or a press perceived as being untruthful — is a foundation of an antidemocratic state: Pravda in the former Soviet Union; the Nazis' use of defamatory falsehoods to discredit political opponents. Reisman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 Col. L. Rev. 1085 (1942) (arguing that libel law is central to democratic survival). *See* Justice White's dissent in *Gertz v. Robert Welsh*, 418 U.S. 323, 400 (1974).

Freedom of the press is like a kite, which needs both discipline and space in the use of the string. Libel laws are the press' string. Cutting the string does not increase the kite's freedom; it causes it to crash. The actual malice standard — certainly as interpreted by the Court of Appeals here — cuts the string of truth. Freedom crashes.

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5. Those of us who have been adults since 1964 have seen a steady decline in the number of newspapers since the *Times* decision. Just this weekend, Hearst announced that it could no longer continue to operate the afternoon San Francisco Examiner.

What would be the harm to freedom, and to freedom of the press, if the standard for liability in a public figure defamation case was less strict than "actual malice"? What would be the harm to freedom if the American public actually believed the press, because the public had some confidence that defamatory, harsh and critical statements about public figures were true, and not protected inventions and buttressed rantings of acknowledged liars? Does anyone imagine that if Ford Motor is kept to a standard of care which includes liability for carelessness, it will stop making cars? Of course not. Ford's recent recall of a record 8.7 million vehicles, though economically costly, will have the economic benefit of having consumers trust in the reliability of Ford cars. Does anyone believe that if the press is held to a standard of truthfulness that it will stop publishing about public figures? Of course not — as can be seen in the press of Britain and our other democratic cousins. Any economic cost will have the corresponding economic and political benefit of having the American people trust in the reliability of what they read.

VIII. THE SEPARATION OF THE ACT OF LIBEL FROM ITS INJURY CONFLICTS WITH BOTH *KEETON v. HUSTLER MAGAZINE* AND *CALDER v. JONES*.

D.C. Code § 13-423(a)(3), provides jurisdiction over a person causing tortious injury in the District of Columbia by an act or omission in the District of Columbia. In *Moncrief v. Lexington Herald-Leader Co.*, 807 F.2d 217, 221 (D.C. Cir. 1986), the D.C. Circuit pronounced a rule of District of Columbia law not based upon any District case, or any other authority, making a metaphysical separation between the "act" of libel and the "injury" libel causes. Under this notion, a defamatory act could occur although no one read or heard the defamation. *Moncrief* distinguished *Keeton v. Hustler*, 465 U.S. 770 (1984) on the ground that the New Hampshire statute

conferred jurisdiction if a defendant "commits a tort in whole or in part in New Hampshire."

Moncrief is inconsistent with *Keeton* and with common sense. The "tort of libel is generally held to occur wherever the offending material is circulated." 465 U.S. at 776. A tort may not occur without an act. The District of Columbia statute does not say "*the act*," but rather "*an act*." Therefore, *an act* of libel occurs wherever the offending material is circulated. "[T]here can be no defamation without publication." *Crane v. New York Zoological Society*, 894 F.2d 454, 457 (D.C. Cir. 1990). A tree falling in the forest with no one near to hear may or may not make a sound; an unpublished defamation, however, is not an act of libel.

Moncrief appears to have crafted special procedural protections to defendants in libel and defamation actions in addition to constitutional protections embodied in the substantive laws. This conflicts with *Calder v. Jones*, 465 U.S. 783, 790-791 (1984). The Court of Appeals in this case was bound to follow *Moncrief*, whether or not it thought it desirable. Only this Court can clarify whether the metaphysical parsing of act and injury in libel cases should continue to govern the District.

CONCLUSION

The Court of Appeals fashioned a series of immunities for the publication of a known liar's falsehoods: the acknowledgement shield; the trusted reporter shield; the confessional shield. The Circuit fashioned the neutral reportage doctrine into a form of constitutional protection, then ignored that the doctrine does not apply to advocacy pieces. The Circuit acknowledged that Esquire's advocacy was fashioned upon a fabricated endorsement, but found that such fabrication did not

constitute actual malice. Finding penumbra emanating from the actual malice standard, the Circuit fashioned special rules insulating defendants in public figure defamation cases from general rules of agency and general logic, imagining that the act of defamation can occur without anyone hearing or reading the defamatory statement. The Court of Appeal's decision was in direct conflict with this Court's teachings in *St. Amant*, *Masson*, and *Anderson*.

But the problem may be with the actual malice standard itself. In *New York Times v. Sullivan*, this Court calculated that the economic cost of subjecting the media to damage verdicts for publishing falsehoods was less than the economic cost if the media failed to publish the truth. There was no evidence that damage awards would prevent publication of harsh truths. This calculus was made at a time of racial turmoil; the decision revealed a profound mistrust that juries could deal with issues of desegregation, and a lack of confidence that judges could properly review damage awards. The actual malice standard is now perceived as being so "daunting" that it protects publication of vicious cinematic fiction invented by a notorious liar.

This Court invented the actual malice standard — it is neither in the Constitution nor in the common law of libel which existed at the time the First Amendment was framed. The invention filled a perceived need to protect the press in a time of radical change in the country's race relations. This Court can withdraw or restrict the invention, in order to fill an obvious need for a press that is perceived as filling democracy's thirst for truth.

The invention of the actual malice standard was unnecessary for democracy until 1964. A "free" and undisciplined press which no one believes (or from the evidence in this case, should believe) is antithetical to democracy. The

actual malice standard of *New York Times v. Sullivan* should be re-examined. At the least, certiorari should be granted to conform the standard's interpretation to the decisions of this Court which have not protected deliberate falsehoods, however artfully crafted.

Respectfully submitted,

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APPENDIX A — COURT OF APPEALS OPINION DATED JANUARY 30, 1996

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 6, 1995 Decided January 30, 1996

No. 94-7137

ROBERT C. MCFARLANE,
APPELLANT

v.

ESQUIRE MAGAZINE, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 92cv00711)

Forrest A. Hainline, III argued the cause and filed the briefs for appellant.

Bruce W. Sanford argued the cause for appellees. With him on the brief were *Lee T. Ellis, Jr.*, *Henry S. Hoberman* and *Robert D. Lystad.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appendix A

Before: WILLIAMS, GINSBURG and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge*: In the late '80s and early '90s articles appeared in the American press asserting an "October Surprise"—a scheme by members of the 1980 Reagan–Bush campaign team to thwart President Carter's efforts to negotiate the release of Iran's American hostages by inducing the Iranians to delay their agreement. Ultimately (in January 1993) a bipartisan task force of the House of Representatives emphatically rejected these claims. See Joint Report of the Task Force to Investigate Certain Allegations Concerning the Holding of American Hostages by Iran in 1980, H. Rep. No. 102–1102 (102d Cong., 2d Sess.) ("Task Force Report"). In the meantime, however, defendant Craig Unger wrote and defendants Esquire Magazine and Hearst Corporation (collectively "Esquire") published an article sketching out the conspiracy theory in lurid terms. The magazine's October 1991 cover asked, "Did the Republicans conspire with Iran and Israel to delay the release of the hostages and steal the 1980 presidential election?" The article's answer appeared to be a qualified Yes.

In a breathless and kaleidoscopic account rivaling an Oliver Stone movie, Unger writes that plaintiff Robert McFarlane, while an aide to Senator Tower, attended a February 1980 meeting with Iranian officials in Teheran—a meeting that "helped set up later meetings in Madrid, which in turn paved the way for the crucial October rendezvous in Paris." (In the "October rendezvous" George Bush and William J. Casey are supposed to have closed the deal by which Iranians stalled hostage negotiations in exchange for promises of arms. But see Task Force Report at 173 (finding that the records and testimony "conclusively prove candidate George Bush's whereabouts in October 1980," and that he did *not* travel to Paris in the period alleged).) It is not said just how the

Appendix A

February meeting "helped set up" later meetings (or how those "paved the way" for the supposed climax in Paris), but in the course of the account the defendants used language effectively calling McFarlane an Israeli spy. McFarlane focuses on this passage, which quotes from Ari Ben–Menashe, a self-professed former Israeli spy and a major source for conspiracy theorists:

> In February 1980, Ben–Menashe says, Robert "Bud" McFarlane, then an aide to Senator John Tower, and Earl Brian, a businessman who had been secretary of health in Reagan's California cabinet, met highly placed Iranian officials in Teheran. In a sworn affidavit submitted by Elliott [sic] Richardson on behalf of one of his clients, a computer-software company called Inslaw, Ben–Menashe states that both McFarlane and Brian had a "special relationship" with Israeli intelligence, McFarlane having been *recruited* by Rafi Eitan, a legendary Israeli agent who was the model for a leading character in John LeCarre's *Little Drummer Girl*. "*McFarlane was the famous Mr. X in the Pollard case,*" adds Ben–Menashe, referring to the trial of Jonathan Pollard, an American convicted of spying for Israel. In Pollard's case there were persistent allegations about *another, unnamed American who secretly worked for the Israelis.*
>
> Both McFarlane and Brian have declined comment.
>
> McFarlane and Brian's visit, Ben–Menashe says, helped set up later meetings in Madrid, which in turn paved the way for the crucial October rendezvous in Paris.

(Emphasis added, except for *Little Drummer Girl.*)

Unger's article discloses doubts about Ben–Menashe's credibility, including quotations from intelligence officials and journalists calling him a "fake" and a "con man." The article also says that Ben–Menashe took a lie detector test for a news organization and "failed miserably," but then adds that "it's almost impossible to dismiss him."

McFarlane brought suit against both Esquire and Unger in the U.S. District Court for the District of Columbia, alleging that the above passage falsely conveyed to Esquire's readers that McFarlane was an Israeli spy and a traitor to his country. After discovery the district court granted defendants' motion for summary judgment. It held that it had no personal jurisdiction over Unger and that no reasonable jury could have found, by clear and convincing evidence, that Esquire had published the piece with "actual malice," i.e., with knowledge that the statements were false or with reckless disregard of their probable falsity, which McFarlane, as an undisputed public figure, would have to prove in order to win his case. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1293 (D.C. Cir. 1988). We affirm.

* * *

I. *Personal jurisdiction over Unger*

McFarlane claims that the court had personal jurisdiction over Unger by virtue of subsection (3) or (4) of the District's statute relating to personal jurisdiction based on conduct linked to the District:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—
>
> (1) transacting any business in the District of Columbia;
>
> . . .
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
>
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he [1] regularly does or solicits business, [2] engages in any other persistent course of conduct, or [3] derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia.

D.C. Code 1981 § 13–423(a). Although the D.C. Court of Appeals reads subsection (1) to extend to the "limits of due process," see *Environmental Research Int'l v. Lockwood Greene Eng.*, 355 A.2d 808 (D.C. 1976), McFarlane does not assert it. See also *Calder v. Jones*, 465 U.S. 783 (1984) (exploring limits of due process as applied to personal jurisdiction over out-of-state writer of an article defaming a resident of the forum state). And the subsections he does assert are unavailing. The first, § 13–423(a)(3), requires that both tortious injury and an act predicate to it take place within the District. But Unger's acts were not in the District; it is undisputed that he wrote the article in New York and delivered it to Esquire in New York. The case is therefore like *Moncrief v. Lexington Herald-Leader Co.*, 807 F.2d 217 (D.C. Cir. 1986), where the defendant in Kentucky published and mailed a newspaper that allegedly defamed the plaintiff in the District, and we found no basis for jurisdiction under subsection (3).

McFarlane argues that in a libel action the injury is part of the tort, so that, in law, the defendant has committed an act within the District. We rejected that claim in *Moncrief*, on the ground that to accept it would obliterate subsection (3)'s careful distinction between "injury" and "act." *Id.* at 220–21. McFarlane appears to concede that circuit precedent excludes Unger from the purview of § 13–423(a)(3), and invites us to overrule *Moncrief*. But we have no power to do so, even if we thought it desirable. One panel of the court does not have authority to overrule another. See, e.g., *United States v. Caldwell*, 543 F.2d 1333, 1369 n.19 (D.C. Cir. 1974).

Section 13–423(a)(4) is of no more help to McFarlane. It contemplates jurisdiction when there is tortious injury within the District accompanied by any of three specified kinds of additional contacts between the District and the defendant, not necessarily related to the contested act or injury. *Crane v. Carr*, 814 F.2d 758, 763 (D.C. Cir. 1987). McFarlane has

not shown that Unger had any of the specified types of contacts. His appeal makes no claim at all on the third type—deriving substantial revenue from goods used or consumed, or services rendered, in the District. Invoking the first and second types (regular business or persistent course of conduct), he points to the fact of Unger's having written for six national publications whose circulations include the District and, on two occasions, writing for District-based publications (the *Washington Post* and the *New Republic*). But *writing* an article for a publication that is circulated throughout the nation, including the District, hardly constitutes doing or soliciting business, or engaging in a persistent course of conduct, *within* the District. The writer is not the publisher; Unger's contacts must be assessed separately. See *Keeton v. Hustler Magazine*, 465 U.S. 770, 781 n.13 (1984).

Thus we are left with two articles appearing in Washington-based publications, one in the *Washington Post* (which was written after McFarlane's complaint was filed and is therefore no basis for personal jurisdiction, see *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 52 (2d Cir. 1991); *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 n.1 (5th Cir. 1990)) and one in the *New Republic*. If "regularly" and "persistent" are to have any meaning, sale of two articles to District-based publications over a career in journalism cannot amount to "regularly" doing business or to a "persistent" course of conduct. Thus, without regard to the circuit's "newsgathering exception" to jurisdiction, see *Moncrief*, 807 F.2d at 222–25, we agree with the district court that McFarlane has failed to show contacts between Unger and the District satisfying § 13–423(a)(4). We affirm its finding of a lack of personal jurisdiction over Unger.

We also affirm the district court's decision to dismiss instead of transfer the case against Unger. The plaintiff asked for a transfer under 28 U.S.C. § 1406(a), which permits transfer "in the interest of justice" of a "case laying venue in

the wrong division or district." Where personal jurisdiction is absent and venue is proper (or at least unchallenged, as here), courts have disagreed as to whether a request for transfer should be analyzed under § 1406(a) or instead under 28 U.S.C. § 1404(a). See generally 15 Charles A. Wright et al., Federal Practice and Procedure § 3827, at 263–67 (1986). In this particular case it appears to make no difference. Our standard of review is the same—abuse of discretion—under both sections. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (adopting abuse of discretion standard, noting need to balance multiple factors, in transfer under § 1404(a)); *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 789 (D.C. Cir. 1983) (applying abuse of discretion, without discussion, in transfer under § 1406(a)). And, although § 1404(a) calls on the court to consider "the convenience of parties and witnesses" (in addition to "the interest of justice," which both sections specify), neither party addresses arguments uniquely pertinent to convenience. Accordingly, we need not try to resolve the "nearly hopeless muddle" of conflicting reasoning and precedent as to which statute properly applies. *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1106–07 (5th Cir. 1981).

The district court's denial of a transfer matters because the statute of limitations for defamation has now apparently expired in New York, the place where McFarlane could most readily secure jurisdiction over Unger. The district judge explained that while denying such a transfer thus exacts a "heavy penalty," the fault for the problem rests with McFarlane, who was put on notice, by Unger's answer to the complaint, of Unger's intention to rely on a defense of lack of personal jurisdiction, and nonetheless failed to file a protective suit in New York. The district court further reasoned that McFarlane would not be prejudiced by denial of transfer, as Esquire had adequate insurance. That strikes us as something of an oversimplification, as McFarlane's quest for

vindication would more easily be satisfied (as we shall see) in a suit against Unger than against Esquire, because of Unger's far greater awareness of the reasons to doubt the truth of the article's claims. Nonetheless, because of McFarlane's notice of the defense and his counsel's inexplicable failure to file a protective suit, we think the district court was within its discretion in denying a transfer.

II. *Evidence of Esquire's actual malice*

McFarlane concedes that he is a public figure, having held various high-level positions in the Reagan Administration, including those of special envoy to the Middle East and National Security Advisor. As such, McFarlane must show that the evidence in the record could support a reasonable jury finding by clear and convincing evidence that the allegedly defamatory statements were made with actual malice, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255–56 (1986), i.e., with "knowledge that [they were] false or with reckless disregard of whether [they were] false or not," *New York Times Co. v. Sullivan*, 376 U.S. at 279–80. See also *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) (actual malice shown if there is a "purposeful avoidance of the truth"); *Tavoulareas v. Piro*, 817 F.2d 762, 775–76 (D.C. Cir. 1987) (citing cases). We first consider whether Unger's state of mind may be attributed to Esquire for these purposes, and then, having concluded that it may not, examine the evidence as to the state of mind of Esquire's employees.

A. *Attribution of Unger's state of mind to Esquire*

If Unger had been an employee of Esquire, his state of mind could undoubtedly be attributed to his employer. See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253–54 (1974). As McFarlane effectively acknowledges, however, Unger was working as an independent contractor, not as an employee. McFarlane notes that Unger did use the prestige of Esquire by representing himself to interviewees as working for Esquire, so we assume that Esquire may have established some sort of agency relationship with Unger. Thus we consider the question whether the malice of a non-employee agent can be imputed to the principal under *New York Times v. Sullivan*.

New York Times itself is a good place to start. There the Court threw out the case against four individuals who (the Court assumed) had authorized use of their names as makers of the defamatory statement, explaining that "there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard." 376 U.S. at 286. Thus the Court refused to impute to the individuals as principals any information in the minds of persons they authorized to act as their agents in the matter.

Nonetheless, a different rule might apply to a corporate defendant, which can act only through agents of one sort or another—employees or non-employee agents. Yet the courts have not so found. Commonly they have interpreted *Cantrell* as barring liability on any theory other than *respondeat superior* (which is limited to employees). See, e.g., *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1446 (8th Cir. 1989); *Secord v. Cockburn*, 747 F. Supp. 779, 787 (D.D.C. 1990). But *Cantrell* doesn't say that. The writer in question was an employee of the corporate defendant, and, although the trial court had given an instruction somewhat muddling the categories of employee and agent, no one had objected. *Cantrell*, 419 U.S. at 253–54 & n.6. So *Cantrell* presented no occasion for the Court to address the issue of when the mental state of non-employee agents may be imputed to the principal. See also *Masson v. New Yorker Magazine, Inc.*, 832 F. Supp. 1350, 1371 (N.D. Cal. 1993) (discussing *Cantrell*).

McFarlane invokes *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 n.19 (7th Cir. 1982), but in that case the Supreme Court had already determined that the plaintiff there was not

a public figure, so that states were free to impose liability on whatever ground they chose, "so long as they do not impose liability without fault." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). On remand the Seventh Circuit applied an actual malice standard anyway, because Illinois law had adopted that standard for statements derived from public proceedings (some of which were at issue), and because (it ultimately concluded) the plaintiff had satisfied even that heightened standard with respect to yet other statements not covered by that privilege. *Gertz*, 680 F.2d at 537. As *Masson* explains, 832 F. Supp. at 1372–73, in so doing the court was willing to attribute the knowledge of the independent-contractor writer to the defendant under Illinois agency law for purposes of Illinois defamation law. *Gertz*, 680 F.2d at 539 n.19. *Gertz* neither asserts nor cites authority for the proposition that vicarious liability can be the basis for finding actual malice under *New York Times*, apart from *respondeat superior*. In the next section of its opinion, to be sure, the *Gertz* court affirmed the imposition of punitive damages against the principal, *Gertz*, 680 F.2d at 540, which under federal constitutional law requires a showing of actual malice, see *Gertz*, 418 U.S. at 349; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756–57 (1985), but with no discussion or analysis of the issue. In practice, then, *Gertz* has little significance as a ruling on actual malice under the *New York Times* standard, and our own analysis leads us to conclude that under *New York Times* actual malice may not be attributed outside *respondeat superior*.

Liability for the acts of a non-employee agent normally flows from the principal's authorization of the agent's acts, and establishment of the principal-agent relationship as a threshold matter is based largely upon control of one party by the other. See Restatement of Agency 2d §§ 140, 14. The question here is what *kind* of control (if any) might suffice to tie Esquire to Unger's knowledge for these purposes. In *Hunt v. Liberty Lobby*, 720 F.2d 631 (11th Cir. 1983), the court addressed the possibility that a principal might be liable for the malice of a non-employee agent on the grounds of its control over the agent's activities. Cf. Restatement of Agency 2d § 254 (discussing imputation of agent's defamation to principal, without reference to malice). But the court in *Hunt* seemed to assume that the positions of independent contractor and of agent were mutually exclusive, *Hunt*, 720 F.2d at 649, which they are not, Restatement of Agency 2d § 14 N cmt. a, and therefore conflated the enterprise of showing someone to be a de facto employee with that of showing agency. In any case, the court found no control by the publisher, as the writer had simply sold the publisher a finished product. *Hunt*, 720 F.2d at 648–49 & n.30. This overlooks the fact of the publisher's ability to edit and, ultimately, to veto the publication—the court does not say that the article was sold on a take-it-or-leave-it basis. Similarly, in *Price v. Viking Penguin*, 881 F.2d 1426, the court examined the editor's relation to the author. Finding that it was limited to matters of structure, priorities and clarity, the court declared that the author "clearly was not an employee of Viking such that liability could be imputed, were we to find any," *id.* at 1446. Despite the court's reliance on the finding that the writer was not an employee, its examination of the editing process suggests that it may have viewed some forms of editorial control as a possible basis for vicarious liability for the state of mind of a non-employee agent, classification of the writer as an employee being clearly out of the question.

Although *Hunt* and *Price* seem to require an employment relationship, they might also be understood as supposing that some kinds of intense editorial involvement by a publisher's employees might entangle them in the independent writer's thought process enough to serve as a basis for holding the publisher vicariously liable. But why should editorial controls that take the employee editors themselves to a point *short* of actual malice be deemed to establish the publisher's actual

malice? One answer might be that not to do so creates a perfect escape hatch for deep-pocket publications. But the answer is not completely satisfactory, as any writer who knowingly ventures into legally risky waters, and who is reluctant to experience personal bankruptcy, would presumably demand an indemnity agreement, putting the publisher on the line. Further, actual malice is a First Amendment protection predicated on a subjective state of mind, *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (citing *New York Times*), which surely cuts against any extension of vicarious liability beyond respondeat superior. Because we doubt that actual malice can be imputed except under *respondeat superior*, and because in any case McFarlane presents no evidence showing Esquire's supervision of the *process* by which Unger turned raw data into finished article (as distinct from control over his final product), cf. Restatement of Agency 2d § 14 N cmt. b, we conclude that McFarlane may show Esquire's malice only through evidence of the information available to, and conduct of, its employees.

B. *Evidence that Esquire editors had actual malice*

Because both parties in their original briefs made little effort to distinguish between the possible malice of the two defendants, we ordered an additional round of briefing directed to evidence of actual malice on the part of Esquire's editors. We assume, in favor of McFarlane, that information in the mind of each individual Esquire editor may be aggregated with information in the mind of every other editor, but we do not decide the point. Our review persuades us that McFarlane failed to submit evidence from which a jury could find such malice.

McFarlane's supplemental brief on the issue is obscure. In a series of paragraphs the brief asserts that "Esquire editors

knew . . ." various facts. The facts are largely ones that appear on computer disks containing Unger's transcriptions of his notes of interviews with various sources, which Unger sent over to Esquire. But with one exception the Esquire editors questioned on the matter said (and McFarlane offers no reason why a jury should disbelieve them) that they did not examine the transcripts; the single exception, research editor Mark Warren, said that he had spot checked some of them—so far as appears, only those of Ben-Menashe and Richardson. But McFarlane does not claim material conflicts between the Ben-Menashe transcripts and the published article's accounts of his claims. Thus, as we shall see, McFarlane is driven largely to rely on Esquire's alleged distortions of what Richardson had to say.

McFarlane's contentions that Esquire had actual malice comprise four basic points. First, he suggests that Esquire editors not only had reasons to doubt Ben-Menashe's truthfulness but also in fact doubted it—so much so that their decision to publish without further corroboration showed malice. Second, McFarlane claims that Esquire either knowingly, or with reckless disregard, participated in Unger's (alleged) fabrication of a "pedigree" for Ben-Menashe in the form of an endorsement by Elliot Richardson. Third, McFarlane suggests that general aspects of Esquire's presentation of the article—segment headings, promotional blurbs elsewhere in the magazine, and the yellow highlighting of certain passages—add to the "defamatory sting" of the specific passage on McFarlane. Finally, McFarlane says that Esquire editors fabricated the article's statement that he had denied comment. We review these points in turn, recognizing that McFarlane is entitled to an aggregate consideration of all of these claims—with the evidence construed most favorably to him—to see if he has met his burden. *Tavoulareas*, 817 F.2d at 794 n.43.

Appendix A

1. *Reasons to doubt the credibility of Ben-Menashe*

Ben-Menashe is the source for many of the details in "October Surprise," including the ones in the passage under attack in this case. Several of Unger's sources made clear to him their belief that Ben-Menashe was a liar, and Esquire does not deny its awareness of these views; it couldn't, as the article passed a substantial chunk of them through to the readers. The article directly quotes a former CIA officer and a Washington Post journalist as calling him, respectively, a "liar" and a "con man." It notes that when he took a lie detector test he "failed miserably," and it quotes an ABC News producer as saying that in the lie detector test Ben-Menashe "goes way off the chart on all relevant questions. My theory is that a lot of what he says is true, but that Ari exaggerates his own role and muddies the water." But full (or pretty full) publication of the grounds for doubting a source tends to rebut a claim of malice, not to establish one. See *Tavoulareas*, 817 F.2d at 788 n.35.

We are not, of course, saying that one may altogether shield a defamation simply by including the source's reputation as a liar. Here Esquire supplied an answer of sorts to the question of why, knowing Ben-Menashe's flaws, they still saw fit to pass his accusations on to its readers. Editor William Blythe approved addition of the phrase, "Yet it's almost impossible to dismiss him," directly after the recitation of Ben-Menashe's vulnerabilities. Explaining the decision, he testified. "We wouldn't have used him as a source unless we thought he had some knowledgeability.... We ... knew that he ... was the [sic; "a"?] source of the Iran-Contra story, and certainly that had checked out, and also that Congress was investigating Ari Ben-Menashe's charges and using him as a witness." Esquire's editor-in-chief, in the course of elaborating on his denial that he "knew that what Ben-Menashe was saying was as likely to be false as it was to be true," also pointed to Ben-Menashe's apparent vindication

Appendix A

in Iran-Contra. And the editors relied on Unger's record; he had worked with Esquire editor David Hirshey on two earlier pieces, and Hirshey had found him "exemplary." Reliance on a reporter's reputation can indeed show a lack of actual malice by a publisher. See *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 478 (8th Cir. 1987); *McManus v. Doubleday & Co.*, 513 F. Supp. 1383, 1390 (S.D.N.Y. 1981). Cf. *Washington Post Co. v. Keogh*, 365 F.2d 965, 971-72 (D.C. Cir. 1966) (exploring difficulties in using writer's questionable reputation against the publisher). McFarlane does not dispute the validity of these bases for Esquire's going forward (though he does, of course, assert Esquire's allegedly inadequate attention to countervailing negatives).

As to Ben-Menashe's being interviewed by congressional staffers, we have in the past given weight to the fact that a source told congressional investigators the same story that he told the defendant, under circumstances where lying could have serious consequences. See *Tavoulareas*, 817 F.2d at 791 (source gave information to congressional investigators in formal setting which, though without oath, could possibly lead to criminal liability for lying). But no one should suppose that such colloquies add up to some sort of congressional endorsement. That it may make sense for congressional staffers to give the time of day to a wildly improbable source, on the off chance that he will yield something useful, tells virtually nothing about the source's credibility. Further, Esquire does not even claim to have had information that Ben-Menashe's statements to the investigators were the same as to Unger, and it offered no evidence that the circumstances of the interviews in any way would have alerted Ben-Menashe to the penalties for lying.

McFarlane says that Esquire "reviewed" a report by the PBS television documentary "Frontline," showing that an arms dealer, Houshang Lavi, *not* Ben-Menashe, attended a meeting at the L'Enfant Plaza with some Reagan campaign

foreign policy advisers. (*This* meeting actually occurred. See Task Force Report at 109–18.) From the fact that the final article did *not* mention the L'Enfant Plaza meeting, whereas Unger's original draft did, expressing doubt about Ben–Menashe's claim to have been present there, McFarlane argues that the jury could infer a willful intent to suppress an instance where Ben–Menashe was proven flat-out false. It is not clear to us that the pronouncements of an obscure international arms dealer are so self-evidently true that they could be said to establish the falsity of Ben–Menashe's claims, though of course the contradiction is not trivial. (In fact, the strongest evidence presented to the Task Force on the identity of the foreign interlocutor, a contemporaneous memo by participant Richard Allen, identifies him as one A. A. Mohammed, a Malaysian and so far as appears in no way connected to Ben–Menashe or Lavi. See *id.* at 115.) Moreover, McFarlane has not directed our attention to any depositions indicating what real contact Esquire editors may have had with the Frontline report or with raw data as to the L'Enfant Plaza meeting generally.

In sum, given Ben–Menashe's supposed role as a source in Iran–Contra, Unger's reputation with Esquire, and the inherent difficulties in verifying or refuting a claim that someone is the agent of a foreign power, the proofs do not add up to the possibility of a reasonable jury finding of clear and convincing evidence of reckless awareness of probable falsity, and in no way show an actual belief in falsity.

2. *Fabrication of the Elliot Richardson endorsement of Ben–Menashe's credibility*

McFarlane claims that "October Surprise" artificially boosted Ben–Menashe's credibility, fabricating a "pedigree" for him with quotations from Elliot Richardson—referred to in the article as the "moral hero" of Watergate—purporting to show that Richardson took Ben–Menashe seriously. First, recall that the disputed passage includes the following sentence:

> In a sworn affidavit submitted by Elliott [sic] Richardson on behalf of one of his clients, a computer-software company called Inslaw, Ben–Menashe states that both McFarlane and Brian had a "special relationship" with Israeli intelligence, McFarlane having been recruited by Rafi Eitan, a legendary Israeli agent who was the model for a leading character in John LeCarre's *Little Drummer Girl.*

The statement is technically false in one narrow respect—Richardson evidently did not appear as counsel of record in the Inslaw case. But he later said (and it is not disputed) that he was on the legal team for Inslaw, and he evidently so represented himself to Unger, who was Esquire's only claimed source of information about Ben–Menashe's Inslaw affidavit.

The sentence has a far more serious flaw. Its latter part, beginning with "McFarlane having been *recruited* by Rafi Eitan," is not in the affidavit. Nor indeed is there anything in the affidavit remotely supporting the statement in the article's following sentences, making McFarlane out to be an equivalent of Pollard—a spy who had pled guilty to, in effect, selling masses of top secret U.S. material to the Israelis. While McFarlane does not dispute that Ben–Menashe made these assertions to Unger, the text of the affidavit supports only the idea of a "special relationship." Thus, says McFarlane, Esquire stretched the Richardson imprimatur from the relatively innocent "special relationship" all the way to the charge of espionage.

Esquire offers two answers. First, it now argues that there is "no material difference" between the "recruited by" and "special relationship" phrases. This is fanciful. "Special relationship" seems infinitely elastic, while "recruited," in context, suggests a switch of allegiance to a foreign power. Second, Esquire's editors testified that they recognized that

the passage might appear to suggest that the whole accusation was in the affidavit, but that they ordered changes—their recollection was the addition of the comma—to indicate the contrary. Their brief also notes that the *affidavit* surely would not have cited *Little Drummer Girl*, alerting the reader to the fact that the spy charge was not advanced in the affidavit. Although we find the comma theory pretty thin, this imprimatur stretch seems as consistent with linguistic muddle as with reckless disregard, and in context not enough, even in conjunction with other evidence, to show actual malice by Esquire editors.

McFarlane puts more stress on Esquire's use of a truncated quote from Richardson in a mention of the Ben–Menashe affidavit in the course of a generic canvassing of Ben–Menashe's spotty credibility:

> And former attorney general Elliott [sic] Richardson ... has submitted sworn affidavits by Ben–Menashe on behalf of a client. A standard legal gambit, perhaps, but Richardson finds Ari Ben–Menashe a compelling witness. "I take him seriously as being who he says he is," says Richardson.

Richardson's actual comment, as reflected in Unger's earlier draft and substantially corroborated in his notes, was, "Quite apart from what he knows, I take him seriously as being who he says he is." Esquire's editors removed the first clause from Unger's draft, in McFarlane's view greatly increasing the intensity of the endorsement.

Esquire argues that any problem here is solved by an affidavit of Richardson, filed in this litigation, saying that "[t]he statements and quotations attributed to me accurately reflect statements I made to Mr. Unger, and accurately reflect my views of Mr. Ben–Menashe." But while the statement may aid Esquire in a defense of truth (on a rather peripheral matter, *not* the defamatory material itself), it does

not dispose of the question of actual malice, which turns on Esquire's subjective beliefs and purposes at the time of publication. Esquire saw Unger's notes, and they speak for themselves.

Nonetheless, we think the explanation by Esquire—that they deleted the clause because of space considerations and because of its ambiguity—altogether plausible. "Quite apart from what he knows" could be taken to mean that Richardson believed Ben–Menashe's claimed identity but not his statements, or it could mean that Richardson wanted to emphasize his belief in Ben–Menashe's identity, not simply Ben–Menashe's apparent knowledge. The clause *is* ambiguous. And with or without it this Richardson endorsement seems to add up to very little.

We are more troubled about a different discrepancy between Unger's notes and the final article. The notes, quoting Richardson's statements to Unger about Ben–Menashe, say (correcting obvious typographical errors): [1]

> [O]ne thing that is true of people like him is that they live in a world of such constant deception [ ] that they are used to moving without misstep between truth and fabrication so he doesn't help much with the October surprise story to verify the truth.

As Esquire put most of its eggs in the Ben–Menashe basket, both for October Surprise generally and for the

[1] The transcript, without corrections, reads as follows:

> ... one thing that is true of people like him is that they live ina world of such cosnstatn deception is that they are used to moveing without missssetp bewtwen truth and fabircation so he deosnt help much wit hte ocrotber surprise sty toverify the truthufl

accusation against McFarlane, this seems a sharp renunciation of its star witness by his putative champion. The statement is in Unger's notes of his talks with Richardson, and it is undisputed that Mark Warren browsed in precisely those notes. But at no time, so far as we can tell, did McFarlane's counsel ever ask Warren whether he'd spotted this passage and, if so, what he made of it. Accordingly, its presence, though puzzling, cannot much help McFarlane.

We are also troubled by the fact of Unger's uncontradicted testimony that he sent to Esquire a draft including a quote about Ben–Menashe from Richardson, "I can't tell if the son of a bitch is telling the truth." The editors apparently removed it, with the purpose, according to Unger, of "maintaining the integrity of what Mr. Richardson said." This appears to be some sort of jargon for suppressing material inconsistent with a broad effort to build up Ben–Menashe's credibility. Still, in view of the article's inclusion of solid material damning Ben–Menashe, the removal gets only limited weight.

3. *Embellishments*

McFarlane points to aspects of the article's presentation that generally hype its broad theme of Republican skullduggery—the yellow highlighting of certain sentences in the article that push the theory forward (but not ones that detract from it), the inclusion of a cover sticker ["**OCTOBER SURPRISE** DID THE **Republicans conspire** with **Iran** and **Israel** to DELAY the RELEASE of the **hostages** *and* **steal** *the* 1980 PRESIDENTIAL **election?**"] (typography in original), the placement of color photographs, and the use of bold section titles. But while these displays of bias may be the sort that deprive Esquire of any "neutral reporting" privilege, *In re UPI*, 16 Media L. Rep. (BNA) 2401, 2408 (D.D.C. 1989), but see *White v. Fraternal Order of Police*, 909 F.2d 512, 514, 528 (D.C. Cir. 1990) (leaving open the scope of the privilege

under District law)), none of the displays relates directly to McFarlane or goes directly to Esquire's subjective intent to tell a mistruth or speak with willful disregard of truth. "The fact that a commentary is one sided and sets forth categorical accusations has no tendency to prove that the publisher believed it to be false." *Westmoreland v. CBS, Inc.*, 601 F. Supp. 66, 68 (S.D.N.Y. 1984).

4. *The report of McFarlane's refusal to comment*

In the last stages of editing, Esquire changed the article's treatment of McFarlane's response to the charges. "McFarlane . . . denied the charges" became "McFarlane . . . refused comment." Esquire's David Hirshey testified that they had been holding space for McFarlane's response, but were told by Unger that McFarlane had refused to agree to any kind of interview. Indeed, McFarlane wrote that he thought he would be "of little help" to Unger, essentially declining to be interviewed.

McFarlane notes that Unger's letter requesting help from McFarlane was phrased very blandly, saying that he was about to do an article on the October Surprise and asking for an interview. There was not a clue as to the depths of the charges ("By the way, I plan to accuse you of being an Israeli spy."). And Mark Warren acknowledged having seen a copy of the letter to McFarlane, and the latter's reply, in the editing process. In a later telephone call, according to McFarlane's executive assistant, Unger mentioned October Surprise and Inslaw, but, again, not a word about espionage. Thus Warren and Esquire were on some notice of what had led to McFarlane's position. In retrospect, this looks at least very careless, but not enough to entangle Esquire in Unger's apparent misleading, which would be necessary for Esquire's behavior to help show actual malice on its part. "[P]laintiff must prove more than an extreme departure from professional standards." *Harte–Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989).

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* * *

The standard of actual malice is a daunting one. McFarlane has been accused of espionage and, because the trial court rightly believed that want of adequate evidence of malice was the simplest way of addressing the claim against Esquire, has as yet had no opportunity to secure vindication. Compare Arnold A. Lubasch, "Time Cleared of Libelling Sharon But Jurors Criticize its Reporting," New York Times, Jan. 25, 1985, at A1 (reporting jury finding that Time's story about Israeli general Ariel Sharon was false and defamatory but not published with actual malice); cf. *Herbert v. Lando*, 603 F. Supp. 983, 988 (S.D.N.Y. 1985) (noting submission of special verdict to jury in *Sharon v. Time, Inc.*, 83 Civ. 4660(ADS) (S.D.N.Y. 1985)). Nonetheless, as the dismissal was correct, we must affirm.

Because of the correctness of the finding on malice and of the trial court's dismissal of the claim against Unger for want of personal jurisdiction, the judgment is

Affirmed.

APPENDIX B — MEMORANDUM OPINION FILED JUNE 8, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 92-0711 TAF

ROBERT C. McFARLANE,

Plaintiff,

v.

ESQUIRE MAGAZINE, *et al.*,

Defendants.

MEMORANDUM OPINION

This is a defamation suit arising from an article written by defendant Craig Unger entitled "October Surprise" and published by defendant Esquire Magazine in October 1991. Jurisdiction of the Court is based on diversity of citizenship under 28 U.S.C. § 1332. Plaintiff Robert McFarlane alleges that the article conveyed to the public false and defamatory statements that he was an Israeli spy and a traitor to his country. Plaintiff's prayer for relief includes compensatory and punitive damages, in addition to the costs of the suit.

The background of this case is discussed in the Court's Memorandum Opinion of May 27, 1993, ("Mem. Op."), in which the Court denied plaintiff's motion for partial summary

judgment on the issue of truth and plaintiff's request for sanctions, and need not be repeated in detail here.[1] Briefly, though, the Esquire "October Surprise" article raised allegations that Reagan-Bush campaign operatives had engaged in an "arms for hostages" deal with representatives of the Ayatollah Khomeini, a deal which included delaying the release of the Iranian-held hostages until after the November 1980 presidential election.

The passages in "October Surprise" which plaintiff contends defame him state:

> In February 1980, Ben-Menashe says, Robert "Bud" McFarlane, then an aide to Senator John Tower, and Earl Brian, a businessman who had been secretary of health in Reagan's California cabinet, met highly placed Iranian officials in Teheran. In a sworn affidavit submitted by Elliot Richardson on behalf of one of his clients, a computer-software company called Inslaw, [Ari] Ben-Menashe states that both McFarlane and Brian had a "special relationship" with Israeli intelligence, McFarlane having been recruited by Rafi Eitan, a legendary Israeli agent who was the model for a leading character in John LeCarre's *Little Drummer Girl*. "McFarlane was the famous Mr. X in the Pollard case,"

1. In a separate opinion, the Court also granted in part plaintiff's motion to amend the complaint, but denied that part which sought to add a claim for declaratory relief.

> adds Ben-Menashe, referring to the trial of Jonathan Pollard, an American convicted of spying for Israel. In Pollard's case there were persistent allegations about another, unnamed American who secretly worked for the Israelis.
>
> Both McFarlane and Brian have declined comment.
>
> McFarlane and Brian's visit, Ben-Menashe says, helped set up later meetings in Madrid, which in turn paved the way for the crucial October rendezvous in Paris.

"October Surprise" at 95.

Now before the Court is defendant Unger's motion to dismiss the action against him for lack of personal jurisdiction, or in the alternative for summary judgment. Argument was heard on this motion in March 1993. The Court allowed the plaintiff additional time for discovery regarding personal jurisdiction and the parties filed supplemental briefs on this issue.

Also before the Court is defendants' motion for summary judgment on the grounds that plaintiff cannot meet his burden of proving that defendants published "October Surprise" with actual malice. Argument was heard on this motion on April 20, 1994.

This Memorandum Opinion discusses both motions. For the reasons set forth below, the Court grants Unger's motion to dismiss. Holding in the alternative, the Court finds that even if it

does have personal jurisdiction over Unger, plaintiff's complaint should be dismissed because there is no genuine issue of material fact regarding actual malice. Therefore, the Court grants defendants' motion for summary judgment.

Motion to Dismiss

I.

Craig Unger, author of "October Surprise," in an affidavit filed with the motion, states that he is a resident of New York, New York. Unger is not now, nor has he ever been, an employee of Esquire Magazine or the Hearst Corporation; he is a freelance journalist, hired by Esquire to write "October Surprise." He states that he was paid a lump sum for writing the article and was reimbursed for expenses incurred.

Although Unger lived in the District for nine months from 1975 to 1976, he has not lived in the District since that time. He did travel to the District on two occasions in June 1991, to interview certain individuals and to review government documents for "October Surprise." Unger states that the telephone calls and visits to the District were primarily for the purpose of gathering information for the article. Unger conducted the vast majority of the more than 150 interviews for the article by telephone from his residence in New York. Unger drafted the article in New York. He states that he had no control over and did not participate in the publication or distribution of the article.[2]

Unger has had other contacts with the District, but he avers

2. Plaintiff disputes Unger's lack of control because Unger chose to publish his article in Esquire Magazine.

that they have been for the primary purpose of gathering news for articles. He estimates that he has travelled into the District eight times in the last ten years, including the two visits in June 1991 for the "October Surprise" article. He further states that he is not a member of, or employed by, any organization or business located in the District. Unger also does not own or possess any real property in the District, nor does he have a bank account in the District.

II.

Plaintiff asserts jurisdiction under D.C. Code §§ 13-423(a)(3) and (4), the long-arm statute, which provides, in pertinent part, that:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's —
>
> . . .
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia:
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from

goods used or consumed, or services rendered, in the District of Columbia

. . .

D.C. Code §§ 13-423(a)(3) - (4). The claim for relief must arise from "acts enumerated in this section". *Id.* at (b). While it is the plaintiff's burden to demonstrate a sufficient factual basis for the assertion of long-arm jurisdiction, he need only make a *prima facie* showing that jurisdiction is conferred by the statute and "any pleadings and affidavits should be strongly construed against the moving party." *Law Offices of Jerris Leonard v. Mideast Systems,* 630 F. Supp. 1311, 1313 (D.D.C. 1986) (citations omitted); *Reuber v. United States*, 750 F.2d 1039, 1052 (D.C. Cir. 1984) (without an evidentiary hearing, any disputes should be resolved in favor of nonmoving party) (citation omitted). Plaintiff must show that the exercise of jurisdiction comports both with the constitutional requirements of due process and the requirements of the D.C. long-arm statute.[3] *Fogle v. Ramsey Winch Co. Inc.*, 774 F. Supp. 19, 21 (D.D.C. 1991).

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3. As an initial matter, plaintiff contends that Unger has waived all objections to jurisdiction except for a claim to the newsgathering privilege, because of his response to an interrogatory. Because plaintiff believes that the newagathering privilege does not apply to Unger, he did not file a protective action against him in New York. The statute of limitations for a libel claim in New York has now run.

Unger's Answer and response to the interrogatory, however, stated clearly that he would be relying on personal jurisdiction and the newsgathering privilege as a defense. *See* Fn. 6 *infra*. Therefore, Unger has not waived any objections to jurisdiction.

A. *Acts or omissions in the District.*

For jurisdiction to lie under D.C. Code § 13-423(a)(3), plaintiff must demonstrate that a tortious injury occurred in the District of Columbia and that this injury was caused by defendant's act or omission within the District. *Akbar v. New York Magazine Co.*, 490 F. Supp. 60, 63 (D.D.C. 1980). This section is "a precise and intentionally restricted tort section," which does not take into consideration contacts other than the defendant's act in the District. *Moncrief v. Lexington Herald-Leader Co.*, 807 F.2d 217, 221 (D.C. Cir. 1986) (citation omitted).

Plaintiff has satisfied the first step: he has made a *prima facie* case that he suffered an injury in the District by the publication of the article in *Esquire* magazine, which is a national magazine. *See Crane v. New York Zoological Soc.*, 894 F.2d 454, 457 (D.C. Cir. 1990) (libel injury felt where person lives) (citation omitted).

Plaintiff has no such success with the second step, however. Unger avers that the act of writing took place entirely outside the District and that he had no involvement in the actual printing or distribution of the article. Therefore, Unger committed no acts within the District. *See Moncrief*, 807 F.2d at 220 (no jurisdiction where the act, printing and mailing of the newspaper, occurred outside of District); *Margolis v. Johns*, 483 F.2d 1212, 1218 (D.C. Cir. 1972) (where defamatory statements were uttered in Wisconsin, the "act" occurred outside the District).

Plaintiff urges the Court to ignore the precedent set by *Moncrief* and *Margolis* because they misconstrue the language of the long-arm statute by focusinq on "the act" instead of "an

act" as specified in the D.C. statute. Plaintiff maintains that by writing "October Surprise" and by delivering it to a national magazine which published the piece nationally, Unger participated in "an act" of publishing that article in the District. Therefore, plaintiff argues, because a tort cannot occur without an act, and the "tort of libel is generally held to occur wherever the offending material is circulated," *Keeton v. Hustler Magazine*, 465 U.S. 770, 777 (1984), Unger committed an act in the District and jurisdiction should lie under this section.

Plaintiff's argument is unavailing.[4] While characterizing *Moncrief* and *Margolis* as performing "metaphysical surgery" on the statute, plaintiff misses the point. The *Moncrief* Court distinguished *Keeton*, noting that the long-arm statute at issue there did not distinguish between the "act" and the "injury," unlike the District statute which does. *Moncrief*, 807 F.2d at 221; *see also Reuber*, 750 F.2d at 1049-50 (because of the statutory requirements, "it would be playing word games with the statute to say the 'act' occurs wherever the 'injury' it causes takes place."). Unger committed no act within the District; therefore jurisdiction does not lie under D.C. Code § 13-423(a)(3).

B. *Act outside/injury inside District.*

To acquire jurisdiction under § 13-423(a)(4), the plaintiff must meet three requirements: (1) a tortious injury must occur in the District of Columbia; (2) the injury must be caused by defendant's act or omission outside the District; and (3) the defendant must satisfy one of the "minimum contacts" with the District enumerated in paragraph (a)(4). *Akbar*, 490 F. Supp. at

4. Indeed, plaintiff recognizes as much as he states that the "Court would be bound to follow *Moncrief* if plaintiff relied only upon § 13-423 and if Esquire were not a national magazine."

63. As discussed above, plaintiff can show an injury in the District. While Unger disputes whether any injury was caused by his act or omission outside the District, he does admit that he wrote the article. Construing the pleadings against Unger, the moving party, plaintiff has made a *prima facie* showing that he was injured by the article. Thus, plaintiff has satisfied the first two steps of (a)(4).

Because the harm-generating act occurs outside the District, the statute requires some other reasonable connection with the District before jurisdiction can be asserted. *Crane v. Carr*, 814 F.2d 758, 763 (D.C. Cir. 1987) (the "something more" or "plus factor" serves to filter out cases in which the impact is "an isolated event and the defendant otherwise has no, or scant, affiliations with the forum.") (citations omitted). Plaintiff must show that Unger either: (1) regularly did or solicited business in the District; (2) engaged in any other persistent course of conduct in the District; or (3) derived substantial revenue from goods used or consumed, or services rendered in the District. D.C. Code § 13-423(a)(4). These other connections may be unrelated to the claim in suit. *Crane*, 814 F.2d at 763.

1. *Regularly doing or soliciting business or engaging in any persistent course of conduct.*

The minimum contacts that are required for regularly doing business or engaging in a persistent course of conduct should "at least be continuing in character." *Security Bank v. Tauber*, 347 F. Supp. 511, 515 (D.D.C. 1972); *accord Parsons v. Mains*, 580 A.2d 1329, 1330 (D.C. 1990). In addition, the mere act of newsgathering in the District "is not to be considered as doing or soliciting business or engaging in a persistent course of conduct as those terms are used in § (a)(4)." *Akbar*, 490 F. Supp. at 64

(citations omitted); *see also Neely v. Philadelphia Inquirer Co.*, 62 F.2d 873, 875 (D.C. App. 1932) (setting forth newsgathering privilege).

Unger argues that his contacts with the District, telephone calls and visits, have been infrequent and sporadic, for the primary purpose of gathering news. Unger avers that he does not own or possess any real property, have a bank account, or engage in any business related activity in the District. Thus, Unger contends, because his contacts with the District have been for the purpose of gathering news, the "newsgathering privilege" embodied in § 13-423(a)(4) bars the exercise of personal jurisdiction over him.

Plaintiff cannot demonstrate that Unger's contacts with the District were for any reason other than gathering news. Failing that, plaintiff argues, however, that the newsgathering privilege does not apply to national publications or to their writers, but only to local publications whose immediate circulation does not include the District. Because Esquire Magazine is circulated within the District, the newsgathering privilege does not apply to it, plaintiff maintains, relying on *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 434 (D.C. Cir. 1976). Therefore, because Unger chose to write for Esquire, plaintiff contends that the newsgathering privilege does not apply to Unger either.

Plaintiff's argument fails for two reasons. First of all, plaintiff assumes that the Court has personal jurisdiction over Unger because it has personal jurisdiction over Esquire. Esquire's contacts with the District are irrelevant; each defendant's contacts with the forum state must be assessed individually. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) (citation omitted).

Second, plaintiff's reliance on *Verlag* is misplaced and he confuses the minimum contacts prongs of section (a)(4). Although the *Verlag* Court noted that the newsgathering privilege does not bar suits against publishers whose immediate circulation includes the District, the Court was referring to publishers whose news *dissemination* results in substantial revenue from the District, a separate prong of section 13-423(a)(4). *Moncrief*, 807 F.2d at 224-25 (explaining holding in *Verlag*). It is clearly established that merely gathering news is not to be considered as doing or soliciting business or engaging in a persistent course of conduct. *Akbar*, 490 F. Supp. at 64. This privilege applies whether the publication is national in distribution or not. *See Moncrief*, 807 F.2d at 219, 221 (privilege applied even where newspaper circulated in District; plaintiff did not allege jurisdiction under substantial revenue prong); *Layne v. Tribune Co.*, 71 F.2d 223 (D.C. Cir.) (privilege applied even to newspaper that was "circulated extensively throughout the country."), *cert. denied*, 293 U.S. 572 (1934); *Akbar*, 490 F. Supp. at 64 (privilege applied to magazine with subscription and newsstand sales in the District; instead, jurisdiction found under substantial revenue prong).

Because the newsgathering privilege applies to Unger's activities in the District, plaintiff cannot establish personal jurisdiction under the doing or soliciting business or engaging in a persistent course of conduct prongs of section 13-423(a)(4).[5]

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5. Plaintiff did not allege jurisdiction under D.C. Code § 13-423(a)(1), transacting business, in his complaint. He claims now, however, that Unger's affidavit shows that Unger has transacted business in the district sufficient for jurisdiction to lie under section (a)(1). Although this section of the long-arm statute has been interpreted to reach as far as the due process clause allows, a claim for relief must arise from acts related to the suit. *See Koteen v. Bermuda Cablevision, Ltd.*, 913 F.2d 973, 974-75 (D.C. Cir. 1990) (per curiam).

(Cont'd)

2. *Substantial revenue.*

The question remains whether Unger derived substantial revenue from activities in the District. "Substantial revenue" means "enough revenue to indicate a commercial impact in the forum, such that a defendant fairly could have expected to be hauled into court there." *Delahanty v. Hinckley*, 686 F. Supp. 920, 925 (D.D.C. 1986), *aff'd*, 900 F.2d 368 (D.C. Cir. 1990). The focus of the inquiry is on the "quality, quantity and *nature* of the contacts," in determining whether jurisdiction is authorized. *Id.* (emphasis in original, citation omitted).

Unger avers that he received a predetermined contractual fee for his article; his compensation was not tied to the sales of Esquire in the District or elsewhere. Therefore, Unger argues, he derived no revenue from activities in the District, citing *Young v. Mallet*, 371 N.Y.S.2d 1, 3 (N.Y. App. Div. 1975) (royalty income is not traceable to sales in New York but rather to the contract which was executed by the author in California).

Plaintiff argues that a portion of Unger's fee can be fairly apportioned to the District, even if his contract did not do so. Because Esquire receives revenues from the District, so does Unger, plaintiff insists. In addition, Unger frequently writes articles for national publications which distribute in the District, including The New Republic, Vanity Fair and People Magazine.

(Cont'd)

Unger's connections with the District do not fit within section (a)(1) as they were for the purpose of gathering news. As discussed *supra*, the mere gathering of news is not to be considered as doing or soliciting business under section (a)(4). This analysis would also seem to apply to section (a)(1). Therefore, that Unger gathered news in the District does not translate into transacting business in the District. Plaintiff cannot establish personal jurisdiction under section (a)(1).

Plaintiff again confuses Esquire's contacts with the District with Unger's contacts. As discussed above, each defendant's contacts must be assessed individually. Plaintiff has provided no evidence to rebut Unger's statement that he received a lump sum for his article, unrelated to the sales of Esquire in the District or elsewhere. Nor has he presented any evidence of revenue received by Unger for articles written for other publications distributed in the District.

Plaintiff also argues that, given that Unger knew his story would be published in the District[6], he should have "reasonably anticipated being haled into court" in the District, citing *Calder v. Jones*, 465 U.S. 783, 789-90 (1984) (personal jurisdiction over author where author knew that his article would have a "potentially devastating impact" upon the plaintiff, specifically where the plaintiff lived). In other cases, courts have found personal jurisdiction when it was reasonably foreseeable that the defendants' product would come into the District, even when the defendants themselves did not send their products into the District, and the defendants derived substantial revenue from these products. *See Delahanty*, 686 F. Supp. at 926 (personal jurisdiction over gun manufacturer although guns entered the District illegally; manufacturer had purposefully availed himself of the District market by national advertising); *Fogle*, 774 F. Supp. at 24 (winch manufacturer did not have a distributor in the District; however, the court found personal jurisdiction because the manufacturer received revenue from winches used in the District). As in these cases, plaintiff contends, Unger

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6. Plaintiff notes that Unger published an article in *The Washington Post* in May 1992, regarding the October Surprise story. This May article, plaintiff maintains, is evidence that Unger knew that the Esquire story would be circulated in the District.

should be held responsible for publication of "October Surprise" in the District.

While it may have been reasonably foreseeable that "October Surprise" would be circulated in the District, without more, there can be no personal jurisdiction over Unger. Plaintiff must satisfy both the constitutional requirements of due process and the statutory requirements of the D.C. long-arm statute. The District of Columbia cases on which plaintiff relies found that both requirements had been met. The long-arm statute at issue in *Calder* allowed the assertion of jurisdiction whenever permitted by the California or Federal Constitutions. *Calder,* 465 U.S. at 786 n.5. Without a showing that Unger derived substantial revenue from goods used or consumed or services rendered in the District, plaintiff cannot establish personal jurisdiction under section (a)(4).

C. *Due Process*

Because plaintiff has not demonstrated that this Court has personal jurisdiction over Unger under the D.C. long-arm statute, the Court will not reach the issue of whether the exercise of personal jurisdiction would comport with the requirements of due process.

III.

Plaintiff requests a transfer of the case under 28 U.S.C. § 1406(a) if the Court finds that it does not have personal jurisdiction over Unger. A court may transfer a case to another district even though it lacks personal jurisdiction over the defendants. *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 789 (D.C. Cir. 1983) (citation omitted), *cert. denied*, 467 U.S. 1210

(1984). Under 28 U.S.C. § 1406(a), plaintiff must show that transfer is in the "interest of justice," although the decision whether to transfer or to dismiss the case is within the Court's discretion. *Id.* at 789 (citations omitted).

Plaintiff maintains that Unger misled him in his interrogatory responses causing him not to file an action in New York. The responses themselves, however, demonstrate that Unger was relying on lack of personal jurisdiction and the newsgathering privilege.[7] In addition, while plaintiff contends that Unger waited until the statute of limitations ran in New York before filing the motion at bar, plaintiff presents no evidence that Unger's timing was an effort to sandbag plaintiff.

Because plaintiff's suit is now time-barred in New York, denying a transfer is a heavy penalty for filing suit in the wrong district. However, that fact alone is not sufficient to grant transfer; plaintiff's choice to file in this district and not in New York seems more of a strategic error than a mistake made "by

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7. Specifically, Unger responded to plaintiff's interrogatory requesting all facts upon which his defense of lack of jurisdiction and venue was based by stating that the defense

> is based on the fact that Craig Unger is not within the personal jurisdiction of the Court. Unger's Third Defense is also based on the newsgathering privilege, which provides that a journalist who merely gathers news in the District of Columbia is not subject to personal jurisdiction in the District of Columbia . . . Since this interrogatory is premature before the completion of discovery, additional persons and documents supporting Unger's Third Defense may be identified at a later time.

reason of the uncertainties of proper venue" or "an erroneous guess with regard to the existence of some elusive fact" upon which personal jurisdiction would turn. *Goldlawr, Inc. v. Heiman*, 82 S. Ct. 913, 915-16 (1962); *see also Cote v. Wadel*, 796 F.2d 981, 985 (7th Cir. 1985) ("[e]lementary prudence" would have indicated that a protective suit was necessary; "proper penalty for obvious mistakes . . . is a heavy one.").

In addition, as Unger points out, plaintiff will not be prejudiced if the case remains in the District of Columbia. Esquire and Hearst have adequate insurance coverage, according to Unger. The District is also the nexus of the alleged injury and activities described in the statements at issue. Transfer of the case at this stage of the proceedings would not be in the interests of justice. The Court denies plaintiff's request for a transfer.

IV.

In summary, for the reasons discussed above, the Court grants defendant Unger's motion to dismiss for lack of personal jurisdiction and denies plaintiff's request for a transfer. An appropriate Order is filed herewith.

Summary Judgment Motion

I.

Defendants move for summary judgment on the grounds that plaintiff cannot meet his burden of proving that defendants published "October Surprise" with actual malice. Defendants also argue that summary judgment is appropriate under the neutral reportage doctrine and the fair report privilege.

Initially, the parties disagree about the admissibility of evidence proffered. Defendants first move to strike plaintiff's objection to the evidence as not being authorized by either the Federal Rules of Civil Procedure or the Local Rules. The Court will treat plaintiff's objection as a motion to strike and therefore denies defendants' motion on this ground.

A. *Plaintiff's exhibit*

Defendants also move to strike plaintiff's exhibit 18, the *Joint Report of the Task Force to Investigate Certain Allegations Concerning the Holding of American Hostages by Iran in 1980*, H.R. Rep. No. 1102, 102d Cong., 2d Sess. (1993). Previously, the Court ruled that this exhibit was inadmissible because defendants had conceded that there were questions about Ben-Menashe's credibility; therefore the report was not relevant. *See* Mem. Op. at 19. Defendants now argue that the *Joint Report* is not evidence of actual malice as it was released in January 1993, some 15 months after "October Surprise" was published. The Court agrees and strikes plaintiff's exhibit 18.

B. *Defendants' exhibits*

Plaintiff moves to strike a number of defendants' exhibits.[8]

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8. Plaintiff does not object to defendants' exhibits 5, 7, 9 13, 33, 36, 38, 39, 41, 44, and 62. Plaintiff's objections to defendants' exhibit 15, *Report of the Special Counsel: The "October Surprise" Allegations and the Circumstances Surrounding the Release of the American Hostages Held in Iran*, and to exhibit 37, telephone log of Craig Unger, are overruled. Previously, plaintiff did not object to these exhibits being admissible in opposition to his partial summary judgment motion. See Mem. Op. at 6 n.3.

Appendix B

Exhibit 1: Affidavit of Elliot Richardson

Plaintiff objects to Elliot Richardson's affidavit on the grounds that it is conclusory and not the best evidence of what he said to Unger; Unger's notes are the best evidence of his conversations with Richardson. Defendants are offering Richardson's affidavit to show what he told Unger, not to prove the contents of Unger's notes. Therefore, the best evidence rule does not apply. *Meyers v. United States*, 171 F.2d 800, 812 (D.C. Cir. 1948) (best evidence rule is limited to cases where the contents of a writing are to be proved), *cert. denied*, 336 U.S. 912 (1949). Richardson's affidavit is admissible to show what he told Unger. *See Luster v. Retail Credit Co.*, 575 F.2d 609, 615 (8th Cir. 1978) (testimony was admitted solely to prove that the words were said); Mem. Op. at 9 (portions of Unger's affidavit regarding statements made to him by Ben-Menashe are not hearsay).

Exhibit 2: Affidavit of Spencer Oliver

Plaintiff objects to the affidavit of R. Spencer Oliver, former Chief Counsel to the House Foreign Affairs Committee, on the grounds that defendants did not provide any information about him until well after the close of discovery. Plaintiff also objects to any references to Oliver, including references in Craig Unger's affidavit, the videotaped interview between Oliver and Ben-Menashe, and Unger's notes from interviews with Oliver, for the same reason. Plaintiff's objections are overruled because Ben-Menashe's affidavit of August 4, 1992, filed in opposition to plaintiff's partial summary judgment motion, stated that he had made statements to Spencer Oliver. Plaintiff cannot claim surprise.

Appendix B

Plaintiff also objects to Oliver's testimony on the grounds that it is inadmissible hearsay. Evidence offered not for the truth but to show that the reporter did not have actual malice is not hearsay. *See* Mem. Op. at 7 (explaining *Liberty Lobby, Inc. v. Anderson*, 562 F. Supp. 201, 203-04 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 1563 (D.C. Cir. 1984), vacated, 477 U.S. 242 (1986)). Plaintiff's hearsay objections are overruled.

Exhibit 3: Affidavit of Ari Ben-Menashe

Plaintiff objects to Ben-Menashe's affidavit on hearsay and unreliability grounds because the *Joint Report* (*see* discussion *supra*) found he was not credible. The affidavit is admissible not for the truth of the matters stated therein but to show what Unger knew when he wrote the article. The affidavit states what Ben-Menashe told Unger. As for the *Joint Report's* conclusions regarding Ben-Menashe's unreliability, defendants cannot be held responsible for conclusions reached about credibility *after* the publication of "October Surprise." *See Secord v. Cockburn*, 747 F. Supp. 779, 792 (D.D.C. 1990) (post-publication events have no impact on actual malice determination). Plaintiff's objections are overruled.

Exhibit 4: Affidavit of Craig Unger

Plaintiff objects to four paragraphs in Craig Unger's affidavit. In paragraph 4, Unger states that he reviewed hundreds of public accounts about the October Surprise, Inslaw and other related issues. "Many of these accounts," he states, "included references to" McFarlane. Plaintiff objects that this is vague and conclusory. However, in paragraph 5, Unger lists various articles, books and other materials that he reviewed for the

article, some of which did include references to McFarlane. *See e.g.*, Joel Bleifuss, "Agent McFarlane," *In These Times*, May 29-June 11, 1991.

In paragraph 27, Unger states that no one provided any information "that contradicted Ben-Menashe's allegations." Plaintiff contends that this is also vague because in order to be evidence of state of mind, the conversations must be given.

Lack of specificity goes to weight and not to admissibility. *See Borecki v. Eastern Int'l Management Corp.*, 694 F. Supp. 47, 51 n.5 (D.N.J. 1988) (same). Defendants also contend that silence of would-be critics is not offered to prove the truth but to prove state-of-mind; therefore, this silence is either admissible non-hearsay, or within the state-of-mind exception to hearsay. *See* 2 John W. Strong, *et al.*, *McCormick on Evidence* § 250 (4th Ed. 1992) (silence is not hearsay when not offered as an assertion). Plaintiff's objections are overruled. The paragraphs are not vague or conclusory and are evidence of what Unger knew.

Plaintiff also objects to paragraphs 7 and 26, on the grounds that they are vague and conclusory. Plaintiff's objections to these paragraphs are overruled as well. In paragraph 7, Unger states that he knew or believed that government sources and journalists were using Ben-Menashe as a source and lists three of these people. In paragraph 26, Unger states that he believed Ben-Menashe was knowledgeable because "several sources told me that they believed he was knowledgeable" and details some of these sources. Unger's affidavit is admissible.

Exhibit 6: Videotaped interview of Ben-Menashe

Plaintiff objects to the videotaped interview of Spencer Oliver and Ben-Menashe on the grounds that it is hearsay and that it cannot be evidence of state of mind because defendants did not view it. Defendants maintain that the tape is admissible because it corroborates Unger's statements that government officials used Ben-Menashe as a source; therefore it is not hearsay. *See Jauch v. Corley*, 830 F.2d 47, 52 (5th Cir. 1987) (videotape admissible to prove that statements were made). Second, defendants contend, the tape is admissible as a proper response to plaintiff's attacks on Ben-Menashe's credibility, which opened the door to evidence of prior consistent statements. *See United States v. Lopez*, 584 F.2d 1175, 1180 (2d Cir. 1978) (stating rule). Finally, defendants argue, the videotape is admissible because it provides "context" and thus, is not hearsay. *See United States. v. Castro-Lara*, 970 F.2d 976, 981 (1st Cir. 1992) (testimony is not hearsay if offered for more limited purpose of providing relevant context or background), *cert. denied sub nom. Sarraff v. United States*, 113 S. Ct. 2935 (1993).

Although the videotape interview between Oliver and Ben-Menashe is perhaps admissible as evidence of prior consistent statements under Fed.R.Evid. 801(d)(1)(B), the Court will strike the exhibit as cumulative. Spencer Oliver's affidavit repeats the essentials of what transpired in his interview with Ben-Menashe.

Exhibit 34: Ronald Reagan autobiography
Exhibit 35: Iran-Contra Hearings

Plaintiff objects to Ronald Reagan's autobiography and William Casey's Iran-Contra testimony on the grounds that they

are hearsay. Unger apparently did not review either one. Defendants, however, claim that that is irrelevant; these exhibits are also admissible for context. The Court previously ruled that these exhibits were inadmissible because they did not fall within any hearsay exception. Mem. Op. at 10-12. Because defendants did not rely on these exhibits, the exhibits are not relevant to whether defendants acted with actual malice. The Court strikes these two exhibits.

Exhibit 45: Bracy v. Kessler, Civil Action No. 89-3135 (D.D.C. 10/7/92)

Exhibit 46: In re United Press Int'l, 16 Media L. Rep. (BNA) 2401 (D.D.C. 1989); *Samborsky v. Hearst Corp.*, 2 Media L. Rep. (BNA) 1638 (D.Md. 1977).

Plaintiff objects to the use of unpublished judicial opinions. Two of the cases on which defendants rely, however, were reported in the Media Law Reporter. *Bracy v. Kessler* is an opinion of Judge Norma Holloway Johnson of this District Court. Defendants may rely on any of these opinions.

Other exhibits

Plaintiff also objects to exhibits 8, 14, 16 - 32, 40, 42, 43, 47 - 61, 63 - 74 on the grounds that they are inadmissible hearsay. As this Court has noted previously and *supra*, evidence offered not for the truth but to show that the reporter did not have actual malice is not hearsay. *See* Mem. Op. at 7. However, only those exhibits with which defendants were familiar are admissible. Thus, defendants' exhibits 17, 48, 49, 50, 59, and 60 are inadmissible because defendants apparently did not rely on them. Exhibit 63, a letter from the U.S. Department of Justice to defendants' attorney regarding an FBI investigation, is not

probative of whether defendants had actual malice. It is not admissible. Defendants' exhibits 8, 14, 16, 18 - 32, 40, 42, 43, 47, 51 - 58, 61, and 64-74, are admissible to show what defendants knew, not for the truth of the matters stated therein.[9]

C. *Conclusion*

The Court, for the reasons discussed above, finds plaintiff's exhibit 18, and defendants' exhibits 6, 17, 34, 35, 48, 49, 50, 59, 60, and 63, inadmissible.

II.

Summary judgment is appropriate if the pleadings and affidavits together show that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 247-48 (1986). To prevail on a summary judgment motion, the nonmoving party must set forth sufficient evidence "favoring the nonmoving party for a jury to return a verdict for that party." *Anderson,* 477 U.S. at 249.

In a libel suit, the plaintiff must demonstrate that the statements complained of are (1) defamatory, (2) false, (3) statements of fact, and (4) made with the requisite degree of fault. *Liberty Lobby. Inc. v. Dow Jones Co.*, 838 F.2d 1287, 1293 (D.C. Cir.), *cert. denied,* 488 U.S. 825 (1988). A public figure[10]

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9. Defendants' exhibits 20 - 28, 43, 47, 64 - 71, and 73 are transcripts or notes from Unger's interviews. These are admissible to show what Unger knew, not for the truth of the matters therein.

10. Plaintiff agrees that he is a public figure.

must demonstrate by clear and convincing evidence that the defendants made the defamatory statements knowing they were false, or with reckless disregard of whether they were false or not. *New York Times Co. v. Sullivan*, 84 S. Ct. 710, 726 (1964). To survive a summary judgment motion, then, the public figure must point to "record facts from which a reasonable jury could find pursuant to a clear and convincing standard that the defendants published" the "October Surprise" article with actual malice. *Secord*, 747 F. Supp. at 785 (citations omitted).

Plaintiff must also demonstrate actual malice "*in conjunction* with a false defamatory statement." *Tavoulareas v. Piro*, 817 F.2d 762, 794 (D.C. Cir.) (*en banc*) (emphasis in original), *cert. denied sub. nom. Tavoulareas v. Washington Post Co.*, 484 U.S. 870 (1987). As defendants point out, the parties have argued about what the challenged statements, as well as the entire article, can reasonably be interpreted as saying. Plaintiff contends that in addition to the statements set forth above, "October Surprise" conveys the idea that he was an Israeli spy and a traitor to his country, even though these words are never mentioned in the article.

It is not necessary for the Court to determine whether the article defames plaintiff by implication to resolve defendants' summary judgment motion. The Court need only focus on the issue of whether the challenged statements, and any implications therefrom, were made with actual malice. *See Secord*, 747 F. Supp. at 783 (although court expressed doubt as to whether the challenged statements were even defamatory, court only reached issue of whether the statements were published with the requisite degree of fault).

Finally, plaintiff must demonstrate actual malice separately

with respect to each defendant. *St. Amant v. Thompson*, 88 S. Ct. 1323, 1325 (1968). Actual malice cannot be imputed from one defendant to another absent an employer-employee relationship giving rise to *respondeat superior*. *Cantrell v. Forest City Publishing Co.*, 95 S. Ct. 465, 471 (1974).

Relying upon representations that Unger made in conversations with various interviewees, plaintiff argues that Unger wrote his article as an Esquire reporter. Unger, however, has averred that he was not an employee of Esquire Magazine', but rather was a freelance journalist hired to write "October Surprise." Thus, plaintiff cannot rely upon the theory of *respondeat superior* to impute evidence of actual malice from Unger to the editors and publishers of Esquire. *See Secord*, 747 F. Supp. at 787 (author was independent contractor; cannot impute actual malice from author to other defendants). To prevail, plaintiff must show with record facts that each defendant acted with actual malice or raise a genuine issue of fact regarding actual malice.

Satisfying the actual malice standard is very difficult for a public figure plaintiff and plaintiff McFarlane fares no better than other public figures before him. Assuming the truth of the evidence upon which plaintiff relies, it is not sufficient to show actual malice or to show that there is a genuine issue of material fact regarding actual malice.

Most of the evidence upon which plaintiff relies involves author Unger. Defendants do admit that

> three experienced editors[11] worked closely

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11. The editors were Articles Editor David Hirshey, Literary Editor Will Blythe, and Research Editor Mark Warren.

> with [Unger] to synthesize the material Unger had gathered on October Surprise. They asked questions, made editing cuts, and contributed some language. They held space for comment they *expected* from McFarlane, but none came.

Defs. Mot. at 15 (emphasis in original). However, plaintiff is unable to point to specific evidence demonstrating any actual malice, or a genuine issue regarding actual malice, on the part of Esquire or Hearst. In addition, holding in the alternative to its dismissal of Unger and assuming *arguendo* that there is personal jurisdiction over Unger, the Court finds that plaintiff is unable to demonstrate that there is a genuine issue of material fact regarding actual malice as to defendant Unger.

III.

Turning to the substance of the motion, defendants argue that the neutral reportage privilege[12] bears on the actual malice determination here and favors dismissal. The Court, in denying plaintiff's partial summary judgment motion on the issue of truth, found that it was unnecessary to decide whether the neutral reportage doctrine applied in this case because even if it did, "October Surprise" would not be protected by it. *See* Mem. Op. at 22. The Court determined that the article was not neutral with regards to Ben-Menashe and in fact advocated his credibility, even while quoting some detractors. Although the Court did permit the parties to brief the issue again, defendants have not presented any reason why the Court should change this determination.

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12. Under the neutral reportage doctrine, accusations against public officials are privileged when published in an accurate and neutral manner. *In re UPI*, 16 Media L. Rep. (BNA) 2401, 2408 (D.D.C. 1989) (Richey, J.).

Defendants also argue that the passage referring to Ben-Menashe's affidavit in the Inslaw case is protected by the fair report privilege. The privilege is applicable to reports of an official government proceeding, such as proceedings before any court, and is a recognized exception to the common law rule that "the republisher of a defamation is deemed to have adopted the underlying defamatory statements as its own." *White v. Fraternal Order of Police*, 909 F.2d 512, 527 (D.C. Cir. 1990) (citation omitted). Pleadings filed in judicial proceedings qualify as official records under the privilege. *Harper v. Walters*, 822 F. Supp. 817, 824 (D.D.C. 1993); *see Lavin v. New York News, Inc.*, 757 F.2d 1416, 1419 (3d Cir. 1985) (privilege applies to affidavits). A report is privileged if it is a fair abridgment of the underlying document and is properly attributed. *See Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88 (D.C. 1980), *cert. denied*, 451 U.S. 989 (1981).

Defendants argue that the following passage is encompassed within the fair report privilege:

> In a sworn affidavit submitted by Elliot Richardson on behalf of one of his clients, a computer-software company called Inslaw, Ben-Menashe states that both McFarlane and Brian had a "special relationship" with Israeli intelligence . . .

Ben-Menashe's Inslaw affidavit only states that McFarlane and Brian had a "special relationship" with Rafi Eitan, however. Unger avers that after reviewing a number of published accounts describing Rafi Eitan as a leading intelligence official in the Israeli government, he believed that "Rafi Eitan" was synonymous with Israeli intelligence. Thus, defendants claim,

although the term "Israeli intelligence" is not a direct quote, it is an accurate paraphrase deserving of the fair report protection.

The Court previously found that it was a question of fact whether a special relationship with Rafi Eitan was equivalent to a special relationship with Israeli intelligence because of a lack of evidence in the record. *See* Mem. Op. at 27-28 (defendants relied upon inadmissible exhibits to support their assertion that Rafi Eitan *was* Israeli intelligence). Although the question now before the Court is whether defendants acted with actual malice, to determine whether the fair reportage privilege applies involves determining whether Rafi Eitan is synonymous with Israeli intelligence. That is still a question of fact and defendants have proffered no new evidence other than Unger's belief that the two were the same. The privilege does not apply.

IV.

Regarding the actual malice determination, defendants contend that the evidence of their state of mind prior to publication precludes a finding of actual malice. The existence or non- existence of actual malice must be determined as of the date of publication. *Secord*, 747 F. Supp. at 792.

Prior to publication, defendants claim that they were aware that McFarlane was linked to Israeli intelligence and to the October Surprise. In an affidavit attached to the motion, Unger stated that as part of his research, he read articles, books, and other materials which raised concerns regarding the Iran-Contra affair, the October Surprise controversy, and the Pollard scandal. Many of these publications raised the same issues that Unger later addressed in his article. *See, e.g.* Joel Bleifuss, "Agent McFarlane," *In These Times*, May 29-June 11, 1991 ("Last Week

Ben-Menashe told House Judiciary Committee investigators, as he had claimed in a sworn March 21 affidavit in the Inslaw case, that McFarlane was a paid agent of Israel") [Def. Ex. 29]. Unger also knew or believed that former government officials and other journalists had used or were using Ben-Menashe as a source. *See, e.g.*, Gary Sick (former National Security Council staff member), "The Election Story of the Decade," *N.Y. Times*, Apr. 15, 1991 [Def. Ex. 14]; *The Election Held Hostage*, PBS Frontline television broadcast, Apr. 16, 1991 [Def. Ex. 8]. Defendants argue that Unger's good faith reliance on "previously published reports in reputable sources . . . precludes a finding of actual malice as a matter of law." *Dow Jones*, 838 F.2d at 1297 (citation omitted).

Second, Unger knew that congressional investigators were inquiring into Ben-Menashe's allegations. Unger spoke with Spencer Oliver during the early and mid-summer of 1991. Oliver had interviewed Ben-Menashe to determine whether a congressional investigation should be pursued into the allegations concerning the October Surprise theory. In an affidavit, Oliver states that BenMenashe made almost the same allegations to him about McFarlane that were reported in Esquire Magazine. In his conversation with Unger, Oliver reported that Ben-Menashe had made these allegations. Oliver also told Unger that he and other staff members of congressional committees were exploring these allegations further. Two of the Esquire editors involved in editing the piece testified in affidavits that they were also aware of, and relied upon, the existence of congressional investigations in publishing the article. Defendants contend that their awareness of congressional investigations based on Ben-Menashe's allegations demonstrates their lack of malice. *See Tavoulareas*, 817 F.2d at 791 (author had reason to believe source who had provided

substantially the same information to congressional investigators).

Third, defendants argue, other information seemed to corroborate Ben-Menashe's claims. Ben-Menashe told Unger that the FBI was investigating McFarlane's relationship with Israeli intelligence and gave Unger FBI Special Agent Emmett Cartinhour's home telephone number. That Ben-Menashe had an agent's home telephone number, Unger states, confirmed to him that the FBI was taking Ben-Menashe seriously. Unger adds that his telephone call to Agent Cartinhour also led him to believe that the FBI was investigating McFarlane's relationship with Israel.[13]

In addition, defendants claim, Ben-Menashe's credibility was strengthened by the fact that his affidavit was submitted in court in the Inslaw case by Inslaw's attorneys, which included Elliot Richardson, former Attorney General. Unger also spoke to Richardson, who told Unger that he took Ben-Menashe seriously.

Fourth, defendants contend, there can be no actual malice where Unger interviewed a number of people, none of whom conclusively disproved any of Ben-Menashe's allegations, including those about McFarlane. Several of the people interviewed by Unger did express doubt about Ben-Menashe's credibility: however, none apparently were able to disprove his statements. There can be no actual malice in such a situation, defendants argue. *See Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1259 (5th Cir. 1980) (reporter questioned two people,

13. Agent Cartinhour, when asked by Unger whether the FBI was investigating McFarlane's relationship with Israeli intelligence, said that the FBI "neither confirms nor denies active investigations."

neither of whom disabused him of the allegations; shows that reporter made an honest effort to test his belief), *cert. denied*, 452 U.S. 962 (1981). Moreover, Unger confronted the issue of Ben-Menashe's credibility head-on, defendants maintain, informing his readers that Ben-Menashe had his detractors.

Finally, defendants argue, that Unger was never able to talk directly to McFarlane is not evidence of actual malice. *See Secord*, 747 F. Supp. at 789 (defendant's failure to consult with plaintiff prior to publication is not evidence of actual malice). In fact, according to Unger, he had attempted to get in touch with McFarlane on at least six occasions, through telephone calls and a faxed letter. In one telephone message, Unger stated that he wanted to ask McFarlane "about the allegations made about him in the Inslaw case." Thus, defendants maintain, McFarlane knew that Unger wished to ask him questions about the subject matter of "October Surprise".

Plaintiff's rebuttal can be summed up in several sentences. First, plaintiff contends, defendants were reckless in relying solely upon Ben-Menashe, even though they knew that he had no firsthand knowledge, knew that he had a commercial interest in making his allegations[14], and knew that he was unreliable. Second, Unger had a duty to corroborate the information and lacking any corroboration, should not have published the statements. Unger also expressed serious and persistent doubts as to the truth of the statements in "October Surprise," but published the statements anyway; according to plaintiff, Unger was trying to "get" him. Moreover, plaintiff asserts, the allegations about him are improbable; therefore defendants were reckless in publishing them. Finally, defendants acted with

14. Ben-Menashe was working on a book.

actual malice when they fabricated Elliot Richardson's endorsement of Ben-Menashe and the October Surprise theory.[15]

Plaintiff's evidence, however, is not sufficient to create an issue regarding actual malice. As for relying upon a single source who may have been biased or unreliable, other courts have found that type of evidence insufficient for actual malice. In *Tavoulareas*, the Court found no actual malice where defendants relied upon a single source who had made the same allegations during a formal interview with investigators of a House subcommittee. *Tavoulareas*, 817 F.2d at 791. In *Secord*, the Court found no actual malice despite plaintiff's claims that convicted felons were the sources. *Secord*, 747 F. Supp. at 794 (plaintiff must establish that "even in relying upon an otherwise questionable source the defendant actually possessed subjective doubt.") (citation omitted).

While plaintiff argues that defendants had a duty to corroborate Ben-Menashe's statements, he ignores that Unger did in fact attempt to do so. Furthermore, unlike cases on which plaintiff relies, Unger apparently had no information at hand which refuted the allegations nor did he have information which should have caused him to investigate further. *Compare Foretich v. Advance Magazine Publishers, Inc.*, 765 F. Supp. 1099, 1109-11 (D.D.C. 1991) (defendants made no effort to investigate two specific assertions of fact by knowledgeable persons, which if found to be true, would have discredited the published account;

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15. Plaintiff also claims that defendants agreed by contract to a standard more restrictive than the "actual malice" standard set forth in *New York Times*. The contract stated that Unger would not "defame nor violate the privacy of any person." P1. Ex. 6. As defendants point out, plaintiff cannot be the third-party beneficiary of such a contract. Plaintiff must demonstrate actual malice, regardless of such a contract.

some evidence of actual malice) *with Tavoulareas*, 817 F.2d at 797 (in the absence of evidence that defendant held "serious doubts" about the truth, insufficient investigation alone may not support a libel verdict) (citation omitted).

Unger did talk with Spencer Oliver and several other people, none of whom provided information which conclusively disputed Ben-Menashe's statements, and some of whom supported or confirmed his statements. In addition, Ben-Menashe's allegations were probable enough for congressional committees to investigate them. Thus, plaintiff's claim that actual malice is demonstrated because the allegations were improbable is unavailing.

Unger did know that plaintiff disputed the substance of the statements; however, this alone is not sufficient evidence of actual malice. *See Harte-Hanks Communications. Inc. v. Connaughton*, 109 S. Ct. 2678, 2698 n.37 (denials are so commonplace that they "hardly alert the conscientious reporter to the likelihood of error.") (citation omitted). He also attempted to get plaintiff's comments about the Ben-Menashe allegations, but plaintiff decided not to respond. *See Newton v. NBC*, 930 F.2d 662, 686 (9th Cir. 1990) (defendants tried to interview the plaintiff; no evidence that they deliberately tried to avoid the truth), *cert. denied*, 112 S. Ct. 192 (1991). Unger published that McFarlane had declined comment.

Plaintiff argues, however, that it was false that he declined to comment and Unger knew it. Because that false statement lent credence to Unger's charges, plaintiff claims, this is evidence of actual malice.

McFarlane did decline to be interviewed. Whether this

means that he declined to comment on whether he was an Israeli spy, had been recruited by Rafi Eitan or was Mr. X. is a question of fact. Mem. Op. at 30-31. However, that Unger stated that McFarlane declined to be interviewed is not evidence of actual malice. Unger knew that McFarlane declined to be interviewed because Unger had attempted to talk with him. McFarlane had also written Unger a letter stating that he "would be of little help" to Unger. P1. Ex. 27 (letter dated June 12, 1991). *Compare Airlie Foundation. Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 426 (D.D.C. 1972) (reporter knew that it was false that the CIA had declined to comment but included it in the article anyway).

Moreover, even assuming the truth of plaintiff's charges that Unger was out to "get" him or thought he was a good target, those charges are not sufficient evidence of actual malice. *See Tavoulareas*, 817 F.2d at 795 (reporter's remarks that he planned to "get" plaintiff are "everyday parlance of an investigative reporter;" not enough to show actual malice).

Finally, plaintiff argues that defendants acted with actual malice when they fabricated Richardson's endorsement of Ben-Menashe. In that regard, the article states:

> [a]nd former attorney general Elliott [sic] Richardson, a staunch Republican who emerged as the moral hero of Watergate after he refused President Nixon's order to fire Special Prosecutor Archibald Cox and resigned instead, has submitted sworn affidavits by Ben-Menashe on behalf of a client. A standard legal gambit, perhaps, but Richardson finds Ari Ben-Menashe a

> compelling witness. "I take him seriously as being who he says he is," says Richardson.

"October Surprise" at 103.

Plaintiff maintains that Richardson did not submit Ben-Menashe's affidavit, that his words were falsified in the "October Surprise" article, and that Richardson did not believe Ben-Menashe's affidavit to be true. Thus, by bolstering Ben-Menashe's credibility falsely, plaintiff claims, defendants acted with actual malice. *See Sharon v. Time Inc.*, 599 F. Supp. 538, 582 (S.D.N.Y. 1984) (possible misuse of attribution raises material questions of fact regarding actual malice); *Westmoreland v. CBS. Inc.*, 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984) (reporter may be liable if he knowingly or recklessly misstates the evidence to make it seem more convincing than it is).

What plaintiff clearly ignores, however, is Richardson's affidavit which refutes each of plaintiff's assertions. Richardson declares that he was part of the legal team that submitted several sworn affidavits of Ben-Menashe, including the one at issue here. He also swears that the statements and quotations attributed to him in the article "accurately reflect this] views of" Ben-Menashe. Finally, Richardson avers that he believed portions of BenMenashe's affidavit. Thus, there is no evidence of actual malice on the part of defendants in quoting Richardson.

V.

In summary, viewing the evidence in the light most favorable to the nonmoving party, plaintiff has failed to point to sufficient record facts to put defendants' showing of an absence of actual malice in dispute. Plaintiff is unable to demonstrate that

any of the defendants entertained a "high degree of awareness of . . . probable falsity" or a reckless disregard for the truth such that "a reasonable jury might find that actual malice had been shown with convincing clarity." *See Liberty Lobby Inc. v. Dow Jones & Co. Inc.*, 838 F.2d 1287, 1293 (D.C. Cir. 1988) (citations omitted), *cert. denied*, 488 U.S. 825 (1988). Thus, for the reasons discussed above, the Court grants the defendants' motion for summary judgment.

Appropriate Orders are attached herewith.

s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER FILED JUNE 8, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 92-0711 TAF

ROBERT C. McFARLANE,

Plaintiff,

v.

ESQUIRE MAGAZINE, *et al.*,

Defendants.

ORDER

This matter came before the Court upon defendants' motion for summary judgment. Upon consideration of the parties' briefs and the arguments of counsel at the motions hearing, and for the reasons set forth in the accompanying Memorandum Opinion, it is this 8th day of June, 1994, hereby

ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted; and it is further

ORDERED that this case is dismissed with prejudice with costs to be awarded to defendants.

s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER FILED JUNE 8, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 92-0711 TAF

ROBERT C. McFARLANE,

Plaintiff,

v.

ESQUIRE MAGAZINE, *et al.*,

Defendants.

ORDER

This matter came before the Court upon defendant Unger's motion to dismiss or in the alternative, for summary judgment. Upon consideration of the parties' briefs and the arguments of counsel at the motions hearing, and for the reasons set forth in the accompanying Memorandum Opinion, it is this 8th day of June, 1994, hereby

ORDERED that defendant Unger's motion to dismiss is granted.

s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

APPENDIX E — MEMORANDUM OPINION FILED MAY 27, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 92-0711 TAF

ROBERT C. McFARLANE,

Plaintiff,

v.

ESQUIRE MAGAZINE, et al.,

Defendants.

MEMORANDUM OPINION

This matter comes before the Court on plaintiff Robert McFarlane's defamation suit arising from an article written by defendant Craig Unger entitled "October Surprise" and published by defendant Esquire in October 1991. Jurisdiction of the Court is based on diversity of citizenship under 28 U.S.C. § 1332. Plaintiff alleges that the article conveyed to the public false and defamatory statements that Mr. McFarlane was an Israeli spy and a traitor to his country. Plaintiff's prayer for relief includes compensatory and punitive damages, in addition to the costs of the suit.

There are several motions currently pending. This Memorandum Opinion discusses plaintiff's partial summary judgment motion on the issue of truth and plaintiff's request for

sanctions. The Court will reserve judgment on defendant Unger's motion to dismiss for lack of personal jurisdiction until the close of discovery. Upon consideration of the plaintiff's motion, the defendants' opposition, the plaintiff's reply thereto, the oral arguments, and the entire record, the Court denies plaintiff's motion for partial summary judgment on the issue of truth for the reasons discussed below. The Court also denies plaintiff's request for sanctions for the reasons discussed below.

Summary Judgment Motion

I.

The "October Surprise" controversy revolves around allegations that Reagan-Bush campaign operatives and representatives of the Ayatollah Khomeini secretly agreed to "delay the release of the American hostages held in Iran until after the November 1980 election, thereby assisting in the defeat of incumbent President Jimmy Carter." In exchange, "the Iranians were assured of later receiving supplies of American-made military equipment." *Report of the Special Counsel: The "October Surprise" Allegations and Circumstances Surrounding the Release of the American Hostages Held in Iran*, U.S. Senate Foreign Relations Subcommittee on Near Eastern and South Asian Affairs, 102d Cong., 2d Sess., November 19, 1992, p. 1. (Defendants' Exhibit 9). The Esquire "October Surprise" article was only one of various articles and publications to raise these allegations.

The title page to the "October Surprise" article states in large letters, over the picture of blindfolded hostages:

> Eleven years ago this month, while no one was watching, the CIA and the Reagan-Bush campaign may have committed an act of highest treason. Did they plot to delay the release of the hostages from Iran and steal a presidential election? A tale of international conspiracy and double-dealing[.]

The passages in "October Surprise" which plaintiff contends defame him state:

> In February 1980, Ben-Menashe says, Robert "Bud" McFarlane, then an aide to Senator John Tower, and Earl Brian, a businessman who had been secretary of health in Reagan's California cabinet, met highly placed Iranian officials in Teheran. In a sworn affidavit submitted by Elliot Richardson on behalf of one of his clients, a computer-software company called Inslaw, [Ari] Ben-Menashe states that both McFarlane and Brian had a "special relationship" with Israeli intelligence, McFarlane having been recruited by Rafi Eitan, a legendary Israeli agent who was the model for a leading character in John LeCarre's *Little Drummer Girl*. "McFarlane was the famous Mr. X in the Pollard case," adds Ben-Menashe, referring to the trial of Jonathan Pollard, an American convicted of spying for Israel. In Pollard's case there were persistent allegations about another,

unnamed American who secretly worked for the Israelis.

Both McFarlane and Brian have declined comment.

McFarlane and Brian's visit, Ben-Menashe says, helped set up later meetings in Madrid, which in turn paved the way for the crucial October rendezvous in Paris.

Plaintiff asserts several grounds for its motion. First, plaintiff contends that defendants falsely stated that he is an Israeli spy, that he was the "famous Mr. X in the Pollard case," and that he went to Tehran with Mr. Brian. Second, defendants falsely represented the contents of Ari Ben-Menashe's *Inslaw* affidavit, plaintiff asserts, in that the affidavit did not state that plaintiff had a special relationship with Israeli intelligence, that plaintiff was recruited by Rafi Eitan, or that plaintiff was Mr. X in the Pollard case. Finally, plaintiff contends, defendants falsely stated that he refused to comment upon any of the accusations that he is a spy.

II.

Plaintiff agrees that he is a public figure. In a libel action involving a public figure, before damages can be awarded, a showing of "actual malice" is necessary: that the defamatory statements were made knowing they were false or with a reckless disregard of whether they were false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The plaintiff bears the burden of proof on two issues. First, the plaintiff must show by

a fair preponderance of the evidence that the allegedly defamatory statement is false.[1] *Liberty Lobby, Inc. v. Dow*, 838 F.2d 1287, 1292 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 825 (1988); *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 597-98 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1010 (1989). If the question of truth or falsity is close, then the Court should err on the side of nonactionability. *Dow*, 838 F.2d at 1292. Second, the plaintiff must demonstrate by clear and convincing evidence that the defendant published the defamatory statement with actual malice. *Id.* Plaintiff's motion addresses only the first issue.

Plaintiff supports his motion with sworn statements by McFarlane, Joseph E. diGenova, William H. Webster, and a Freedom of Information Act request to the FBI with the FBI's response, as well as assorted documents. Defendants' opposition contains 36 exhibits including affidavits from Ari Ben-Menashe and Craig Unger, author of the article.

Both parties object to various exhibits. Defendants argue that the admissibility of their exhibits may be irrelevant because plaintiff's affidavits are insufficient to show the truth. Specifically, defendants assert, given the ample body of publicly available evidence which raises legitimate concerns regarding

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1. The parties disagree about the burden of proof on the issue of falsity. Defendants claim that plaintiff bears the burden of proving falsity and actual malice by clear and convincing evidence, citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986) and *New York Times*, 376 U.S. at 286-91. Plaintiff, citing the two *Liberty Lobby* cases noted above, claims that the burden of proving falsity is fair preponderance of the evidence. The Supreme Court has noted that there is some debate "as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence . . . We express no view on this issue." *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2682 n.2 (1989).

the truthfulness of plaintiff's affidavit, it is inappropriate for the Court to rely on that affidavit for purposes of summary judgment. Under the *Wilmington Trust* case, defendants argue, "prospective impeachment" is alone sufficient to defeat summary judgment when

> the disputed fact is (1) within the exclusive knowledge of the movant, whose supporting evidence is (2) subjective in character, and (3) upon whom the burden of persuasion rests.

Wilmington Trust Co. v. Manufacturers Life Ins. Co., 624 F.2d 707, 709 (5th Cir. 1980). Plaintiff contends, however, that whether he is an Israeli spy or Mr. X is not within his exclusive knowledge, unlike *Wilmington Trust* where the witness was admittedly testifying on a subjective issue. Mr. Webster's and Mr. diGenova's affidavits, plaintiff asserts, also support his case.[2]

As an initial matter, plaintiff has demonstrated a prima facie case. Plaintiff's evidence, without considering any evidence proffered by the defendants, including evidence to impeach plaintiff, establishes that the statements in "October Surprise"

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2. Plaintiff filed a Freedom of Information Act (FOIA) request for access to FBI records pertaining to himself. The FBI responded that there were no records responsive to plaintiff's request. The FOIA request and response, together with the affidavits, plaintiff contends, establishes that there is no connection between Mr. McFarlane and Israeli intelligence or Mr. Pollard. The Court agrees with the defendants that the FOIA request and response have no evidentiary value. The FOIA allows the FBI to treat any such documents, if they exist, as non-existent due to national security concerns. Also, other agencies may have documents regarding Mr. McFarlane.

regarding plaintiff are false. However, after reviewing all of the evidence, the Court denies plaintiff's motion for partial summary judgment for the reasons discussed below.

III.

Evidentiary Issues

A. *Defendants' Exhibits*

The parties disagree on the admissibility of evidence proffered by defendants.[3] The Court rules on the admissibility of these exhibits as discussed below.

Exhibits 1 and 2: Ari Ben-Menashe's Esquire affidavit and Craig Unger's affidavit

Plaintiff contends that Ben-Menashe's Esquire affidavit and Unger's affidavit are inadmissible on hearsay grounds. Ben-Menashe's Esquire affidavit states that he "came across information that" Mr. McFarlane was a paid Israeli agent, that he was recruited by Rafi Eitan, and that he was Mr. X. Mr. Ben-

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3. Plaintiff did not object to six of defendants' exhibits: (1) *Report of the Special Counsel: The "October Surprise" Allegations and the Circumstances Surrounding the Release of the American Hostages Held in Iran* (Exhibit 9); (2) *Iran-Contra Investigation: Joint Hearings Before the House Select Committee to Investigate the Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition* (Exhibit 10); (3) Letter from Craig Unger to Robert McFarlane dated June 12, 1991 (Exhibit 27); (4) Letter from Robert C. McFarlane to Craig Unger dated June 12, 1991 (Exhibit 28); (5) Telephone log of Craig Unger (Exhibit 29); and (6) Robert C. McFarlane, *Overstatement*, letter to the editor, *St. Louis Post-Dispatch* (Exhibit 31).

Menashe avers that this information, which he conveyed to Mr. Unger, was the result of Israeli intelligence reports which he had access to and of conversations with Israeli intelligence officials. Mr. Unger avers that the statements and quotes attributed to Mr. Ben-Menashe in the article were made to him by Mr. Ben-Menashe.

Defendants argue that affidavits by a reporter and a reporter's source can be admitted despite claims that they rely on hearsay or that they are not based upon personal knowledge, citing *Liberty Lobby, Inc. v. Anderson*, 562 F. Supp. 201, 203-04 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 1563 (D.C. Cir. 1984), *vacated*, 477 U.S. 242 (1986). Plaintiff's argument, defendants contend, would require reporters to rely only on judicially admissible evidence before writing their stories and would impermissibly shift the burden of proof to the defendants.

Defendants misread *Anderson*. In that case, the affidavits were not offered for the truth but to show that the reporter did not have actual malice. *Id.* Actual malice is not at issue in this motion. Therefore, the affidavits must not rely on hearsay. *See Cormier v. Pennzoil*, 969 F.2d 1559, 1561 (5th Cir. 1992) ("Neither the district court nor this Court may properly consider hearsay evidence in affidavits and depositions.").

Defendants also contend that Ben-Menashe's affidavit is admissible as opinion because personal knowledge does not invariably require personal observation. Personal knowledge, defendants assert, can come from any acceptable source, such as records kept in the ordinary course of business or from a recitation of conversations with others, citing *M.B.A.F.B. Fed. Credit Union v. Cumis Ins. Society*, 681 F.2d 930, 932 (4th Cir.

1982) (under Rule 602, evidence is inadmissible only if the Court finds that the witness could not have actually perceived or observed that which he testifies to). Thus, defendants assert, Ben-Menashe's affidavit is admissible because it relies on Israeli intelligence reports and conversations with Israeli intelligence officials, including Rafi Eitan.

Ben-Menashe's affidavit does not qualify as opinion testimony, either lay or expert. He is not stating his opinion in his affidavit but rather making assertions of fact concerning plaintiff.[4] Additionally, Ben-Menashe's assertions rely on hearsay as well. Although defendants argue that Israeli intelligence reports fall within Fed. R. Evid. 803(8), the public records and reports exception to hearsay, there is no evidence to support this assertion. Furthermore, while it is conceivable that conversations with others could form the basis for personal knowledge, there is no way to distinguish which portions of Ben-Menashe's affidavit rely on conversations and which rely on intelligence reports. Therefore, the portions of Ben-Menashe's Esquire affidavit in which he states that he "came across information" concerning Robert McFarlane (¶¶ 6, 7) are inadmissible.

With regards to Unger's affidavit, those portions regarding statements made to Mr. Unger by Mr. Ben-Menashe (¶5) are not hearsay.

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4. In addition, defendants rely on Ben-Menashe's statements to support several of their statements of material fact. *See* discussion of plaintiff's request for sanctions, *infra*.

Appendix E

Exhibit 3: "The Election Story of the Decade," by Gary Sick *The New York Times*, April 15, 1991

Exhibit 4: "The Election Held Hostage," PBS Frontline Television Broadcast Transcript, April 16, 1991

Exhibit 5: "Agent McFarlane" by Joel Leifuss, *In These Times*

Exhibit 6: "Revelations of an Ex-Spy," by Jan Roberts, *The Age*, May 13, 1991

Exhibit 3, Gary Sick's *New York Times* article, and Exhibit 4, the Frontline Transcript, were referenced in Mr. Unger's letter to plaintiff in which he asked for an interview. Mr. McFarlane responded that it was "a very busy time" for him and that he would be of little help to Mr. Unger. "October Surprise" subsequently reported that plaintiff had "declined comment." Defendants contend that Mr. Unger's reference to Exhibits 3 and 4 in his letter to Mr. McFarlane put him on notice that he would be one of the subjects in a story about the "October Surprise." Therefore, writing that plaintiff had declined comment on the "October Surprise" allegations was accurate, defendants assert. This contention assumes that plaintiff knew about or had seen the article or the documentary and thus knew the references which Unger was making. While the relevance may be slight, it is enough to make the exhibits admissible for a limited purpose, not for the truth of the matters stated therein.

Exhibits 5 and 6 simply repeat some of the statements from Ben-Menashe's *Inslaw* affidavit. For this reason, they are not particularly relevant to this motion and are not admissible.

Appendix E

Exhibit 7: "October Surprise," by Craig Unger, *Esquire*

This document is admissible only to show what defendant Unger said, not for the truth of any statement in it.

Exhibit 11: *An American Life: the Autobiography*, by Ronald Reagan

Defendants offer an excerpt from President Reagan's book to show that Mr. McFarlane had ties with Israeli intelligence. Defendants contend that this exhibit falls within the residual hearsay exception under Fed. R. Evid. 803(24) as it has "circumstantial guarantees of trustworthiness."

While the excerpt arguably has "circumstantial guarantees of trustworthiness," it does not meet the other requirements of Fed. R. Evid. 803(24). For example, the excerpt is not "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Fed. R. Evid. 803(24)(B). Testimony by plaintiff, and the inferences to be drawn therefrom, are more probative on this point than President Reagan's book. Also, the excerpt does not mention that plaintiff had contact with Israeli intelligence; rather, the reported contact was with Israeli officials. This exhibit is not admissible.

Exhibit 12: *Statement of William Casey before the House Permanent Select Committee on Intelligence. November 21. 1986*

Defendants offer Mr. Casey's statement to show Mr. McFarlane's "special relationship with Israel." Plaintiff contends that this testimony of Mr. Casey, who was not cross-

examined, is inadmissible without a showing that he had an opportunity to develop his testimony, citing Fed. R. Evid. 802 and 804(b)(1). Defendants contend, though, that Mr. Casey's statement is an important element in officially published reports of a congressional investigation and further, that it casts doubt on plaintiff's credibility.

This testimony is not admissible under Fed. R. Evid. 804(b)(1) because Casey was not cross-examined. Under Fed. R. Evid. 804(b)(5)(B), this exhibit is also not admissible because it is not "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Testimony by plaintiff, and the inferences to be drawn therefrom, are more probative on this point than Mr. Casey's testimony. In addition, this Court has recognized that testimony before a congressional committee is "manifestly hearsay . . . [and] inadmissible," and would not fall within Rule 803(8)(C) which only applies to a government report of factual findings, not to witness testimony. *Pearce v. E.F. Hutton Group. Inc.*, 653 F. Supp. 810, 815 (D.D.C. 1987). Finally, this testimony is not admissible to impeach plaintiff's credibility. Plaintiff has only denied a relationship with Israeli intelligence, not with Israeli officials in general. *See* Supplemental Declaration of Robert McFarlane at ¶¶ 3-4. Therefore, this exhibit is inadmissible.

Exhibit 13: Report of the Congressional Committees Investigating the Iran-Contra Affair. H. Rep. No. 433. S. Rep. No. 216. 100th Cong. 1st Sess.

The Iran-Contra Affair report is a report of two select committees to investigate assistance to Iran. Defendants cite the report as showing that plaintiff's service to the country has

included close, systematic contact with Israeli intelligence officials. Defendants also cite the report as showing that plaintiff provided false information and lied to the Attorney General.

Under Fed. R. Evid. 803(8)(C), records and reports of public offices or agencies setting forth "factual findings resulting from an investigation made pursuant to authority granted by law" are admissible "unless the sources of information or other circumstances indicate lack of trustworthiness." The rule assumes admissibility in the first instance but provides escape from admissibility if there are sufficient negative factors present. *Beech Aircraft Corp. v. Rainey*, 109 S. Ct. 439, 448 (1988). The trial judge has the discretion to exclude the entire report or portions thereof which are considered untrustworthy. *Id.*

Although this report is the product of two select committees whose ability to investigate assistance to Iran was presumably "pursuant to authority granted by law," it lacks the requisite indicia of trustworthiness for admissibility. The portions which defendants proffer are not joined in by members of both political parties. *See Pearce*, 653 F. Supp. at 815 (lack of trustworthiness of congressional reports may be minimized where portions of report have been joined in by members of both political parties). In addition, although defendants have not submitted that portion of the report which details how the information was gathered, much of the information by necessity must have come from individuals with an interest in the outcome of the investigation. Finally, the report is cumulative of other evidence. Plaintiff's testimony before the Joint Hearings of the select committees, and the inferences to be drawn therefrom, relates essentially to the same issues raised in the report. *Cf: Rainey*, 109 C. Ct. at 449 (other safeguards in the Federal Rules, such as those dealing with

relevance and prejudice, provide the court "with additional means of scrutinizing and, where appropriate, excluding evaluative reports or portions of them."). For these reasons, the report is not admissible under Fed. R. Evid. 803(8), even for impeachment purposes.

Exhibits 14 and 15: Hearings of Joint Iran-Contra Committee. Chronology and Notes prepared by Robert McFarlane

Defendants offer these exhibits, specifically the chronology (exhibit 14) prepared in part by plaintiff, to show that plaintiff has admitted that he worked with Israeli intelligence officials in 1985 in facilitating the shipment of arms to Iran and attempted, with the assistance from Israeli officials, to negotiate the release of American hostages held by Iran. Defendants argue that these documents recount plaintiff's prior statements, oral and written, and are admissible as prior statements under oath under Rule 801(d)(1) or as admissions by a party-opponent under Rule 801(d)(2). However, as defendants note, the chronology was worked on by a number of people. It is impossible for the Court to determine which parts of the chronology were provided by plaintiff, nor should the Court be required to do so. Exhibit 14, therefore, is not admissible.

Exhibit 15 is a note from Robert McFarlane regarding the chronology, recommending certain changes to the chronology. This exhibit is admissible to the extent that it is a statement by plaintiff.

Exhibit 16: Affidavit of Ben-Menashe, Inslaw proceedings

This affidavit is admissible solely to show what Mr. Ben-Menashe said, not for the truth of matters stated therein.

Exhibit 17: Territory of Lies: The Exclusive Story of Jonathan Jay Pollard, by Wolf Blitzer

Exhibit 18: Every Spy a Prince, by Dan Raviv and Yossi Melman

Exhibit 19: Mossad: Israel's Most Secret Service, by Ronald Payne

Exhibit 20: Dangerous Liaisons: The Inside Story of the U.S. Israeli Covert Relationship, by Andrew and Leslie Cockburn

Exhibit 21: October Surprise, by Gary Sick

Exhibit 22: The Inslaw Affair: Investigative Report by the Committee on the Judiciary, H. Rep. No. 857, 102nd Cong., 2d Sess. (1992)

Exhibit 23: The Samson Option, by Seymour Hersh

Exhibit 24: "The Trouble with Ari," by Craig Unger, *The Village Voice*

Defendants offer exhibits 17 through 20 to support the statement that Rafi Eitan was a "celebrated Israeli spy" and "handler of Jonathan Pollard." Defendants offer exhibits 21 through 23 for background on Mr. Ben-Menashe and his role as a source for, among others, "important pieces of the U.S.-Israeli intelligence mosaic." Defendants offer exhibit 24, a *Village Voice* article by Craig Unger on Ben-Menashe, to show that Ben-Menashe had access to very sensitive material.

Although plaintiff argues that each of these exhibits is inadmissible hearsay, defendants contend that they are offered for background and context. Proffered as such, however, the exhibits are necessarily offered for the truth of the matters stated therein. For this reason, these exhibits are not admissible because they do not fall within any hearsay exception.

Exhibit 25: Profits of War, by Ari Ben-Menashe

This excerpt, which essentially repeats Ben-Menashe's statements concerning plaintiff, is hearsay and not admissible. It is also not relevant to the summary judgment proceedings.

Exhibit 30: "McFarlane Implicated in Inslaw Case," *St. Louis Post Dispatch*, March 24, 1991

The article states that Ben-Menashe's *Inslaw* affidavit says that plaintiff had a "special relationship" with Israeli intelligence officials. The article also quotes Mr. McFarlane as saying he is "very puzzled" by the assertions which he called "absolutely false." Plaintiff does not object to the admission of the letter he wrote in response to the article (Defendants' Exhibit 31), but objects to the article as hearsay. Defendants presumably offer this article and plaintiff's response to it to show that plaintiff had knowledge of the nature of Mr. Unger's request for comment. The article and plaintiff's response are probative of plaintiff's knowledge and are admissible for this limited purpose.

Exhibit 32: Opening Arguments, by Jeffrey Toobin

This exhibit is an excerpt from the book, recounting a bench conference during Oliver North's trial. An attorney who was

present quoted Judge Gerhard Gesell as saying that McFarlane was "an intensely unreliable witness in almost every respect of his testimony." Defendants contend that this serves to impeach Mr. McFarlane's credibility while plaintiff argues that it is hearsay. This exhibit is inadmissible as hearsay.

Exhibit 33: Comments by Judge Gesell in North Trial

This segment of the transcript is a statement by Judge Gesell including the comment that plaintiff had "given equivocal and confusing testimony." This statement is not admissible to impeach plaintiff's credibility as it does not address plaintiff's credibility.

Exhibit 34: Judgment in *United States v. McFarlane*, Crim. No. 88078, District Court, District of Columbia

Plaintiff pleaded guilty to four counts of withholding information from Congress in violation of Title 2, U.S. Code § 192, in March 1989. This misdemeanor conviction was subsequently pardoned by President Bush on December 24, 1992. *See* 57 Fed. Reg. 62,146 (President granted clemency to plaintiff and others "whether their actions were right or wrong"). Plaintiff contends that his guilty plea is inadmissible under Rule 609(a)(2) because the crime is one of refusal to cooperate, not a crime of dishonesty. Furthermore, plaintiff argues, under Rule 609(c), a crime is inadmissible if it was pardoned.

Defendants argue that similar to crimes involving failures to file tax returns, plaintiff's conviction is a crime of dishonesty, admissible for impeachment purposes. *See Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 811-12 (9th Cir. 1991) (misdemeanor conviction for filing incomplete tax return which

omitted true income was a crime of dishonesty under Rule 609). The facts of plaintiff's conviction also demonstrate deceit and dishonesty, defendants contend, in that he knowingly failed to provide information of which he was aware to Congress. *See Altobello v. Borden Confectionary Products, Inc.*, 872 F.2d 215, 216-17 (7th Cir. 1989) (although deceit may not necessarily be an element of the crime, the manner in which the witness committed the offense may have involved deceit and as such, "the conviction is admissible under Rule 609(a)(2).").

Although Rule 609(c) prohibits the use of a conviction which has been pardoned, the pardon must be based "on a finding of the rehabilitation of the person convicted" or "based on a finding of innocence." The very language of the President's pardon removes plaintiff's conviction from the protection of Rule 609(c).

Plaintiff's conviction is admissible for impeachment purposes because the crime necessarily involved dishonesty.

Exhibit 35: "The White House Crisis; McFarlane Suicide Attempt" *New York Times*, March 2, 1987

This article discusses plaintiff's suicide attempt and includes statements from plaintiff that he attempted suicide because of a "sense of having failed the country" after the Iran-Contra scandal was revealed. Defendants contend that as plaintiff has "opened the door" to attacks on his credibility by stating that he has spent his life in the service of his country, news articles and testimony which question or contradict this may be admissible for the limited purpose of impeachment.

Plaintiff's statement that he had a "sense of having failed the

country" does not contradict his assertions that he spent his life in the service of his country, however. In addition, while plaintiff's statements may be party admissions, whether plaintiff attempted to commit suicide is not relevant to plaintiff's credibility. The article is inadmissible.

Exhibit 36: Fighting for Peace, by Caspar Weinberger

Defendants offer this excerpt to impeach plaintiff's credibility. However, this excerpt does not question Mr. McFarlane's credibility as much as question his effectiveness as an aide to President Reagan. Under Fed. R. Evid. 608, then, this evidence is not relevant.

B. *Plaintiff's exhibit*

Defendants filed a motion to strike plaintiff's supplemental exhibit, the *Joint Report of the Task Force Investigating the Holding of American Hostages by Iran in 1980*. The Report was released in January 1993. It is relevant, plaintiff asserts, because it shows Mr. Ben-Menashe to be a "fraud and a liar." Plaintiff cites to six passages appearing on five pages of the report.[5] Each of these passages discusses the lack of credibility on Mr. Ben-Menashe's part.

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5. Plaintiff also asserts that the Joint Report is relevant because it shows that "October Surprise" is a "complete fabrication." Additionally, the report is relevant, plaintiff contends, because it was authored in part by a partner in defendants' law firm. Thus, plaintiff argues, the report shows that defendants and their counsel cannot in good faith rely upon Ben-Menashe for the truth of any assertion made in pleadings or papers filed in this litigation. This contention is not relevant for the summary judgment motion but is addressed *infra* in the discussion of plaintiff's request for sanctions.

Because the Court has determined that those portions of Ben-Menashe's affidavit which assert statements about Mr. McFarlane are inadmissible, it is not necessary to determine the admissibility of this report which draws into question his credibility. Furthermore, defendants concede that there are questions about Ben-Menashe's credibility. The report, therefore, is not relevant to a contested issue and is inadmissible.

C. *Conclusion*

The Court, for the reasons discussed above, finds defendants' exhibits 3, 4, 7, 13, 17 through 25, 32, 33, 35 and 36, and plaintiff's supplemental exhibit, inadmissible.

IV.

The motion

A. *Whether the neutral reportage doctrine applies*

As an initial matter, the Court must decide whether any privilege applies in this case. Defendants contend that the allegations made by Mr. Ben-Menashe in the article were not offered for their truth, but included because they "represent serious accusations about a senior government official at the vortex of a controversy of enormous magnitude." Under the neutral reportage doctrine, these types of accusations are privileged when published in an accurate and neutral manner. *See In re UPI*, 16 Media L. Rep. (BNA) 2401, 2408 (D.D.C. 1989) (Richey, J.). Defendants assert that the article questioned Mr. Ben-Menashe's veracity and challenged his motives, leaving the ultimate question of whether to believe his accusations to the reader. Thus, because the article was neutral

in tone and accurate in reciting Mr. Ben-Menashe's charges about a public figure, both from his *Inslaw* affidavit and from his conversations with Mr. Unger, defendants contend the article is protected by the neutral reportage privilege.

The doctrine protects certain articles from libel suits. *In re UPI* applied a two-part test. First, the press must be at liberty to report serious charges against public officials "without excessive concern for the source." *In re UPI*, 16 Media L. Rep. at 2406. Thus, the trustworthiness of the person making the charge is not important; rather, it is the neutrality of the report which is critical. *Id.* at 2407. Second, although reporting both sides of the controversy may eliminate any risk of a lack of neutrality, when the report itself is "essentially factual, neutral and accurate," there is no need to report both sides. *Id.*

Although the neutral reportage doctrine has been applied in at least two cases in this Circuit, the Court of Appeals for the District of Columbia Circuit has expressly declined to decide whether the doctrine applies in this jurisdiction. *See White v. Fraternal Order of Police*, 909 F.2d 512, 514, 528 (D.C. Cir. 1990). Even if the neutral reportage doctrine applied in this Circuit, plaintiff argues, defendants would not fall within it. Plaintiff argues that "October Surprise" is not neutral because defendants espouse a particular point of view and express a conclusion with which they attempt to persuade the reader to concur. In the article, Mr. Unger poses the question of whether there was a "coup" and tells the readers his viewpoint: "I believe that a compelling case can be made that in 1980, this country experienced its first and only coup d'etat and never knew a thing." Additionally, plaintiff argues, the article employs advocacy devices by highlighting certain quotes and headlines

which imply a certain point of view.[6] Finally, although earlier drafts of the article show that defendants were aware that Mr. McFarlane had denied the allegations in Ben-Menashe's *Inslaw* affidavit, these denials were omitted from the final article.

It is not necessary for the Court to decide whether the neutral reportage doctrine applies in this case because even if it did, "October Surprise" would not be protected by the doctrine. Mr. Unger espoused a viewpoint in the article by stating that he believed a "compelling case" could be made for the occurrence of a "coup." Furthermore, the article advocates Mr. Ben-Menashe's credibility. The article does quote some detractors of Mr. Ben-Menashe who say that he is a "liar" and a "con man" and notes that he failed a lie detector test given to him by ABC News. The article, however, goes on to say: "Yet it's almost impossible to dismiss him. " The article also notes that

> former attorney general Elliott Richardson, a staunch Republican who emerged as the moral hero of Watergate . . . has submitted sworn affidavits by Ben-Menashe on behalf of a client. A standard legal gambit, perhaps, but Richardson finds Ari Ben-Menashe a

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6. Plaintiff also argues that the neutral reportage doctrine does not apply to investigative journalists, such as Unger, citing *Lasky v. American Broadcasting Co., Inc.*, 631 F. Supp. 962, 971 (S.D. N.Y. 1986) (when defendant journalist brings about the raging controversy, no protection by the neutral reportage privilege) and *McManus v. Doubleday & Co., Inc.*, 513 F. Supp. 1383, 1391 (S.D. N.Y. 1981) (court did not find that neutral reportage doctrine applied to investigative reporting because such reporting did not promote the purpose of the doctrine, "the freer reporting of raging controversies").

> compelling witness. "I take him seriously as being who he says he is," says Richardson.

The article is not neutral and therefore would not fall within the privilege. *See In re UPI*, 16 Media L. Rep. at 2407 (reporter must not espouse or concur in the matter reported in order to rely upon the privilege).

B. *Whether Mr. McFarlane is or was an Israeli spy.*

Plaintiff contends that the statements in the "October Surprise" article that he is or was an Israeli spy and that he was the "famous Mr. X in the Pollard case" are false. He offers his own affidavit as well as Mr. Webster's to rebut the assertion that he had a "special relationship" with Israeli intelligence and that he was Mr. X. Mr. diGenova also averred that plaintiff had no connection to Jonathan Pollard. Plaintiff averred that he has had no relationship with the Israeli Intelligence Service, nor has he worked for the Service. He also averred that he has never been recruited by Rafi Eitan or any other Israeli agent.

Mr. Webster, former Director of the FBI and the CIA, averred that as Director of the FBI, he was aware of the prosecution of Jonathan Pollard for espionage and of the evidence leading to his indictment and conviction. Mr. Webster averred that he "was and am aware of no evidence connecting Mr. McFarlane to Mr. Pollard." As Director of the CIA, Mr. Webster averred that he was in a position to learn whether there was any evidence connecting Mr. McFarlane to Mr. Pollard or to Israeli intelligence and that he "was and am aware of no such evidence."

Mr. diGenova, former United States Attorney for the District of Columbia, averred that he was in charge of the

prosecution of Mr. Pollard for espionage, and as such, was in a position to know whether there was any evidence of a connection or even a "*suggestion* of such a connection" between Mr. McFarlane and Mr. Pollard. Mr. diGenova averred that he was and is aware of no evidence of such a connection or the suggestion of such a connection.

Defendants dispute whether any of these affidavits is sufficient to support plaintiff's motion. Mr. Webster's affidavit, defendants assert, is explainable only if it is interpreted to mean that he knows of no evidence that the plaintiff worked for Israeli intelligence as a paid, supervised, or controlled agent.[7] Defendants contend that Mr. diGenova's affidavit is also unavailing to plaintiff because it misapprehends the "Mr. X" theory. According to the defendants, Mr. X and Mr. Pollard did not necessarily have to have any connection or direct contact. The theory, defendants assert, is that Mr. X gave highly sensitive information to Israeli intelligence which then used it to direct Mr. Pollard to gather specific documents.

As for plaintiff's affidavit, defendants contend that the public record disputes plaintiff's claim that he has not had a relationship with Israeli intelligence. Defendants argue that the very nature of McFarlane's various government positions, including among others, Special Envoy to the Middle East, necessarily entailed a close and cooperative relationship with

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7. Furthermore, defendants add, the FBI investigated Mr. McFarlane's ties to Israel after Mr. Webster left the FBI. Mr. Ben-Menashe, in his Esquire Affidavit, averred that FBI Agent Emmett Cartinhour told him that the FBI was investigating plaintiff's ties with Israel. However, FBI Agent Emmett Cartinhour, in an affidavit, averred that at no time did he tell Ben-Menashe that the FBI was investigating plaintiff's relationship with Israeli intelligence.

Israeli intelligence. For example, Mr. McFarlane testified at the Joint Hearings before the House and Senate Select Committees investigating transactions with Iran that he had a close relationship with Mr. Kimche, Director General of the Israeli Foreign Ministry, and that he knew of Mr. Kimche's past relationship with Mossad, Israeli intelligence. Other portions of this testimony show that plaintiff was aware of sharing intelligence with Israel. From this testimony, defendants claim that Mr. McFarlane has admitted under oath to working closely with the Israeli intelligence.

A reasonable inference can be drawn from Mr. McFarlane's testimony and his various government positions that he has worked closely with Israeli intelligence. However, it is a leap of logic from this point to argue that Israeli intelligence might have perceived Mr. McFarlane as an "agent." Defendants suggest that "it is eminently possible that McFarlane, with or without his or the United States government's knowledge, provided secret information that assisted the Israelis in many ways." If Mr. McFarlane was or is an Israeli spy, Mr. McFarlane himself would have to be aware of that fact. Similarly, if Mr. McFarlane had been recruited by Rafi Eitan, he would have to have knowledge of that as well.

While Mr. McFarlane has averred that he is not and was not an Israeli spy, nor was he recruited by Rafi Eitan, his credibility has been impeached such that his affidavit is not sufficient to establish that there are no genuine issues of material fact on these issues. Mr. McFarlane was convicted of four counts of withholding information from Congress. This conviction casts doubt on his credibility. Given the impeachment of Mr. McFarlane's affidavit and the inferences to be drawn from his testimony, it is a question of fact whether he had a "special relationship" with Israeli intelligence.

Similarly, whether Mr. McFarlane was Mr. X in the Jonathan Pollard case is a question of fact. Although Mr. Webster and Mr. diGenova averred that they know of no connection between Jonathan Pollard and Mr. McFarlane, their affidavits alone are not sufficient to establish that there is no genuine issue of fact on this issue.

On the issue of whether Mr. McFarlane met Iranian officials in Tehran in February of 1980 with Earl Brian, plaintiff offers his own affidavit and that of Mr. Brian in the *Inslaw* matter. Mr. Brian averred that he had never had any relationship with Robert McFarlane. Given the impeachment of plaintiff's affidavit, the Brian affidavit is insufficient to establish that it is false that Mr. Brian and Mr. McFarlane met Iranian officials in Tehran in February 1980.

C. *Whether defendants falsely represented the contents of Ben-Menashe's Inslaw affidavit*

"October Surprise" reports that

> In a sworn affidavit submitted by Elliot Richardson on behalf of one of his clients, a computer-software company called Inslaw, Ben-Menashe states that both McFarlane and Brian had a "special relationship" with Israeli intelligence, McFarlane having been recruited by Rafi Eitan, a legendary Israeli agent who was the model for a leading character in John LeCarre's *Little Drummer Girl*. "McFarlane was the famous Mr. X in the Pollard case," adds Ben-Menashe, referring to the trial of Jonathan Pollard, an American convicted of spying for Israel.

Plaintiff claims, correctly, that the Ben-Menashe *Inslaw* affidavit does not state that he had a "special relationship with Israeli intelligence," that he was "recruited by Rafi Eitan," or that he was the "famous Mr. X in the Pollard case." Ben-Menashe's affidavit merely stated that Rafi Eitan told Ben-Menashe that he had a special relationship with Mr. McFarlane.

Defendants contend, however, that the only statements in the article attributed to Ben-Menashe's affidavit were that Mr. McFarlane had a "'special relationship' with Israeli intelligence." Rafi Eitan, defendants assert, *was* Israeli intelligence, relying on books and articles describing Eitan's exploits. Therefore, defendants argue, having a special relationship with Rafi Eitan necessarily entailed having a special relationship with "the highest levels of Israeli intelligence."

The only evidence supporting the assertion that Rafi Eitan was Israeli intelligence is Ben-Menashe's *Inslaw* affidavit, which stated that Rafael Eitan was the Israeli Prime Minister's Anti-Terrorism Advisor in 1982. Otherwise, the exhibits defendants rely upon to support their assertion that Rafi Eitan *was* Israeli intelligence are inadmissible. *See supra*. The question, therefore, is whether a special relationship with Rafi Eitan is equivalent to a special relationship with Israeli intelligence. This is a question of fact.

Second, defendants contend that the remaining portion of the Esquire passage does not mention the affidavit but is based on numerous interviews that Craig Unger had with Ben-Menashe. The article uses the phrase ". . . adds Ben-Menashe," defendants assert, to inform the reader that information supplemental to the affidavit has been provided by Ben-Menashe. In his Esquire affidavit, Ben-Menashe confirms that the article correctly recites his conversations with Unger.

By placing the Mr. X statement in quotes with "adds Ben-Menashe," the article makes clear that this statement is not from the affidavit. Therefore, the defendants did not falsely represent Ben-Menashe's affidavit on this point. However, the article does not make it clear whether it is relying on the affidavit as the source for the comment that plaintiff had been recruited by Rafi Eitan. Mr. Unger did aver that the statements and quotes about plaintiff that are attributed to Mr. Ben-Menashe were made to him by Ben-Menashe. Given the article's ambiguity and Mr. Unger's statement, the Court finds that it is a question of fact whether the comment that plaintiff had been recruited by Rafi Eitan can be read as coming from the *Inslaw* affidavit or not.

D. *Whether defendants falsely state that McFarlane refused to comment upon the accusation that he is a spy*

Immediately following the paragraph that McFarlane had a special relationship with Israeli intelligence, that he was recruited by Rafi Eitan and that he was Mr. X is the statement that "Both McFarlane and Brian have declined comment." Plaintiff argues that he was never asked by Unger to comment upon these allegations; therefore, it is false for defendants to say that he declined comment.

Defendants first claim that a refusal to comment is not defamatory as a matter of law, citing *Chapin v. Greve*, 787 F. Supp. 557, 566 (E.D. Va. 1992) ("refusing to answer reporters' questions is commonplace and certainly cannot reasonably be said to tarnish one's reputation."). In *Chapin*, though, a diversity case applying Virginia law, the defendant provided plaintiff's "plausible, nondefamatory explanation for declining to answer questions," while defendants here did not. *Chapin*, 787 F. Supp. at 566. In this diversity case, the Court must apply District of

Columbia law. Read in the context of the previous allegedly defamatory paragraph, the Court cannot as a matter of law say that the statement that plaintiff "declined comment" is not reasonably capable of conveying a defamatory meaning. *See Fraternal Order of Police*, 909 F.2d at 518 (only when a court can say that "the publication is not reasonably capable of any defamatory meaning and cannot reasonably be understood in any defamatory sense" can it rule as a matter of law that it is not libelous), quoting *Levy v. American Mutual Ins. Co.*, 196 A.2d 475, 476 (D.C. 1964).

Defendants next contend that Mr. Unger's letter put Mr. McFarlane on notice that he would be one of the subjects in a story about the "October Surprise." Mr. Unger's letter mentions Gary Sick's article, "October Surprise," and a PBS Frontline documentary, both of which detailed allegations of a secret deal between the Reagan campaign and Iran over the hostages. Mr. Unger averred that he also made at least five telephone calls to Mr. McFarlane in an attempt to obtain comment, once leaving a message that he wanted to ask plaintiff "about the allegations made about him in the Inslaw case."

Furthermore, Mr. McFarlane, defendants contend, was well aware of Mr. Ben-Menashe and his allegations. In fact, Mr. McFarlane had responded to the *St. Louis Post-Dispatch* article which had quoted Ben-Menashe's *Inslaw* affidavit as saying that Mr. McFarlane had a "special relationship" with Israeli intelligence. Mr. McFarlane responded with a letter denying that he had any relationship with General Rafael Eitan as alleged in Ben-Menashe's affidavit. Defendants argue that this evidence shows that when Mr. Unger wrote to Mr. McFarlane and left messages requesting his comments about Ben-Menashe's *Inslaw* affidavit, Mr. McFarlane was on notice that a denial to

comment was a denial to respond to those allegations in the affidavit.

Defendants have conceded, though, that Ben-Menashe's affidavit does not mention that Mr. McFarlane was Mr. X. Ben-Menashe's affidavit also does not accuse Mr. McFarlane of having a special relationship with Israeli intelligence or of having been recruited by Rafi Eitan. Mr. McFarlane did decline to be interviewed; however, whether this can be read as declining to comment on whether he was an Israeli spy, had been recruited by Rafi Eitan, or was Mr. X is a question of fact.

V.

Upon consideration of all of the evidence, the reasonable inferences drawn therefrom and the impeachment of plaintiff's credibility, the Court finds that plaintiff has not met his burden of proving that there is an absence of a genuine issue of material fact concerning whether the statements in "October Surprise" are false. Accordingly, by an Order filed herewith, the Court denies plaintiff's partial summary judgment motion on the issue of truth.

Plaintiff's request for sanctions

Plaintiff requests that sanctions be assessed against defendants and their counsel for statements made in their opposition to plaintiff's partial summary judgment motion that are allegedly not supported by any competent, admissible evidence.

I.

Under Fed. R. Civ. P. 11, the signature of an attorney or party "constitutes a certificate by the signer that the signer has read the pleading, motion or other paper," and that

> to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Sanctions shall be imposed on an attorney who signs the paper without such a substantiated belief. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1989). The Court has discretion to determine whether there has been a violation of Rule 11, testing the signer's conduct "by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." *Miltier v. Downes*, 935 F.2d 660, 664 (4th Cir. 1991), quoting Fed. R. Civ. P. 11 advisory committee's note. While the Court should be mindful not to "chill vigorous advocacy," the Court should interpret the Rule to give effect to its central goal of the deterrence of baseless filings. *Cooter & Gell*, 496 U.S. at 393.

In responding to a properly supported summary judgment motion, the opposing party must designate " 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.*

v. Catrett, 477 U.S. 317, 324 (1986). Supporting and opposing affidavits must be made on personal knowledge, setting forth such facts as would be admissible in evidence. *Londrigan v. FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981). "An affidavit based merely on information and belief is unacceptable." *Id.*

Plaintiff submits a list of what it claims are unsupported statements in defendants' statement of material facts and a list of allegedly unsupported statements in defendants' brief. Defendants contend that their legal and factual representations are supported by competent evidence and fair argument. The issue before the Court is whether defendants, in opposing plaintiff's partial summary judgment motion, violated the requirements of Rule 11.

II.

A. *Whether defendants made unsupported factual assertions in their statement of material facts*

Plaintiff lists seven statements from defendants' statements of material fact that he argues are either unsupported or incomplete or misleading excerpts from their source documents. For example, several of defendants' statements asserting that plaintiff's contacts with Israeli intelligence officials rely on plaintiff's testimony in congressional hearings. As discussed *supra*, however, defendants' statements are reasonable inferences from plaintiff's testimony.

The most serious of plaintiff's allegations revolves around statements which defendants made in reliance on Ari Ben-Menashe's Esquire affidavit. Defendants assert that plaintiff was "a paid agent of Israeli intelligence," that plaintiff was "the Mr.

X in the Jonathan Pollard spy case," and that plaintiff met "highly placed officials in Tehran" in early 1980. Each of these statements of material fact is based on Ben-Menashe's Esquire affidavit. In that affidavit, Ben-Menashe avers that his information is based on "Israeli intelligence reports to which I had access, as well as on conversations I have had with Israeli intelligence officials."

Defendants argue that the statements in Ben-Menashe's affidavit were offered for several purposes, but not for their truth. Defendants assert that Ben-Menashe's affidavit is admissible as opinion testimony and that there is no rule which requires that the entire basis for the affiant's opinion be provided. Defendants also argue that much of what Ben-Menashe based his affidavit on is material which either is not hearsay or falls within an established exception. For example, Israeli intelligence reports, defendants assert, fall within the official reports exception to hearsay.[8]

As the Court determined *supra*, those portions of Ben-Menashe's affidavit which rely on reports and conversations are inadmissible hearsay. Plaintiff argues that by relying on inadmissible hearsay for their statements of material fact, defendants were engaging in sanctionable behavior. *See Manildra Millina Corp. v. Ogilvie Mills, Inc.*, 127 F.R.D. 686,

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8. Defendants continue to argue that in libel suits, affidavits of the key news source are admissible, despite claims that they rely on hearsay or that they are not based upon "personal knowledge," relying on *Liberty Lobby, Inc. v. Anderson*, 562 F. Supp. 201, 203-04 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 1563 (D.C. Cir. 1984), *vacated*, 477 U.S. 242 (1986). However, in *Liberty Lobby*, the affidavits were not admitted to show truth or falsity but to show whether there was actual malice. Actual malice was not at issue in the partial summary judgment motion.

688 (D.C. Kan. 1989) (submission of an incompetent affidavit in support of a key issue in defendant's summary judgment motion might merit some sanctions). Defendants argue, though, that mere citation to hearsay in opposition to summary judgment is not sanctionable under rule 11, citing *Investors Insurance Company of America v. Dorinco Reinsurance Company*, 917 F.2d 100, 106 (2d Cir. 1990) (court declined to extend the parameters of Rule 11 to any mention of inadmissible evidence in the course of making a motion or a pleading).

While defendants' reliance on the affidavit was inappropriate, it was not a violation of Rule 11. Defendants could have reasonably believed that questions about Ben-Menashe's affidavit went to credibility, not to admissibility. *See Miltier*, 935 F.2d at 664 (counsel do not have to be right in their legal position to avoid sanctions, only reasonable) (citation omitted); *Artoc Corp. v. Lynnhaven Dry Storage Marina, Inc.*, 898 F.2d 953, 956 (4th Cir. 1990) (question is whether a reasonable attorney in like circumstances would believe his actions to be factually and legally justified) (citations omitted).

Plaintiff also argues that defendants should not have relied on Ben-Menashe's affidavit because independent investigation would have proven him to be unreliable and his statements to be untrue. For example, defendants assert as a statement of material fact that FBI Agent Cartinhour told Ben-Menashe that the FBI was investigating plaintiff's relationship with Israeli intelligence. Defendants rely on Ben-Menashe's Esquire affidavit for this statement. However, in an affidavit submitted by plaintiff, Agent Cartinhour averred that he never made such a statement to Mr. Ben-Menashe.

Defendants contend that plaintiff has missed the point of

Ben-Menashe's affidavit. In particular, defendants assert, Ben-Menashe's statement that Agent Cartinhour told him about the FBI's investigation of plaintiff demonstrates Ben-Menashe's state of mind and "his tendency to make startling allegations." Defendants, however, did not qualify their statements of material facts to make these points.

It is true that defendants could have sought out Agent Cartinhour as plaintiff's counsel did. The Court need not decide, however, whether defendants *should* have done so in order to satisfy the reasonable inquiry required by Rule 11. If defendants had spoken to Agent Cartinhour, presumably they would have gotten the same statement as plaintiff. Agent Cartinhour does not state that he never spoke to Mr. Ben-Menashe; he merely avers that "[a]t no time did I tell Ari Ben-Menashe that 'the FBI was investigating Robert McFarlane's relationship with Israeli intelligence" or that "the FBI was investigating Robert McFarlane." Mr. Ben-Menashe avers otherwise. The difference in the two statements calls for a credibility determination which is not appropriate on a motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 255 (1986) (credibility determinations are jury functions, not those of a judge in ruling on a motion for summary judgment).

Plaintiff also asserts that defendants neglected to provide the Court with a complete picture of Mr. Ben-Menashe's credibility. In their statement of material facts, defendants assert "Though Ben-Menashe's credibility has been questioned by some, the Senate October Surprise Report concluded that "[h]e undoubtedly had real connections with Israeli intelligence and had access to some highly classified information," citing to the October Surprise Report (Defendants' exhibit 9). Defendants did not provide this portion of the report to the Court. As plaintiff

points out, in the very next sentence, the October Surprise Report states that Ben-Menashe was a "wholly unreliable witness" and that the Special Counsel viewed his testimony with great caution because it was unable to "precisely and reliably separate Ben-Menashe's facts from his fantasies."

The Court agrees with plaintiff that defendants have been less than candid in representing the October Surprise Report's conclusions about Mr. Ben-Menashe. However, defendants' actions do not rise to the level of a Rule 11 violation.

Plaintiff also contends that defendants have a continuing duty to reevaluate their reliance on Mr. Ben-Menashe and a possible duty to reevaluate earlier representations to the Court. The *Joint Report of the Task Force Investigating the Holding of American Hostages by Iran in 1980* ("Task Force Report") was released on January 3, 1993. The Task Force Report essentially concludes that "Ben-Menashe's account of the October meetings, like his other October Surprise allegations, is a total fabrication."[9] Task Force Report at 148. Given this conclusion, plaintiff asserts, defendants should not continue to rely on any allegations of Mr. Ben-Menashe.

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9. Plaintiff also notes that a partner in defendants' counsel's firm, Richard J. Leon, was Chief Minority Counsel for the U.S. House of Representatives Task Force investigating allegations surrounding the "October Surprise" theory. Plaintiff claims that he is not implying any impropriety with this observation but simply noting defendants' continuing duty to reevaluate their reliance on Mr. Ben-Menashe. Mr. Leon averred that, in accordance with rules established by the Task Force regarding disclosure of information, he has never disclosed to defendants' counsel any information obtained during his tenure at the Task Force. Mr. Leon's position with the Task Force and as a partner in defendants' counsel's firm has no bearing on whether defendants have a continuing duty to reevaluate their reliance on Mr. Ben-Menashe.

As plaintiff notes, however, the Court of Appeals for the District of Columbia Circuit has not decided whether Rule 11 should be read to impose postfiling obligations, nor will this Court decide this issue now. *See Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 44-45 (D.C. Cir. 1990) (noting that at least five circuits have held that Rule 11 does not impose a general obligation to discontinue a suit once the factual or legal allegations in the complaint have been discredited). As for defendants' continued reliance on Mr. Ben-Menashe, the Court does not believe that, under Rule 11, the conclusions of the Task Force Report require any action on defendants' part. The Task Force's conclusions about Mr. Ben-Menashe's credibility and his allegations about an "October Surprise" are certainly damning.[10] However, relying on a witness whose credibility can be impeached is not sanctionable conduct.[11]

B. *Whether defendants made unsupported statements in their brief*

Plaintiff cites to many places in defendants' brief in which defendants are allegedly misstating the facts. Many of these alleged misstatements are similar to several of defendants'

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10. It is interesting to note that at oral argument, counsel for the defendants in pointing out that they did not bear the burden of proving truth, stated "[i]s what he [Ben-Menashe] is quoted accurately as saying in the Esquire article, is it true? We are certainly not going to concede that it is false, but we don't know if it is true."

11. On a related matter, defendants contend that plaintiff's counsel has also threatened to seek future Rule 11 sanctions in a settlement letter which mentions the Task Force report. Plaintiff disputes defendants' reading of this letter. Because defendants are not requesting Rule 11 sanctions at this time, the Court will not address this issue.

statements of material facts discussed above. For example, defendants assert that Mr. Ben-Menashe stated, based on his personal knowledge, that plaintiff met highly placed officials in Tehran in early 1980. An early draft of "October Surprise," however, notes that Ben-Menashe learned of plaintiff's meetings in Tehran "through Israeli intelligence reports and his Iranian contact." As discussed above, defendants could have reasonably believed that personal knowledge could be based on Israeli intelligence reports and contacts with others.

Defendants do often draw some conclusions that require leaps of logic. For example, defendants claim that it is

> unremarkable and entirely plausible that Israeli intelligence might have perceived McFarlane as a helper and special friend to Israel, even as an 'agent' for Israel. And it is eminently possible that McFarlane, with or without his or the United States government's knowledge, provided secret information that assisted the Israelis in many ways.

Plaintiff contends that this is sanctionable because it includes a charge of treason without any basis in fact, and is offered without any evidence of independent investigation. However, the use of strong language in such a hotly contested case, while perhaps not necessary, is certainly not unusual. *Cf. Draper and Kramer, Inc. v. Baskin-Robbins, Inc.*, 690 F. Supp. 728, 732 (N.D. Ill. 1988) (attorneys in heated litigation often "employ rhetoric stronger than necessary"). The Court finds that defendants' statements are not violations of Rule 11.

III.

Accordingly, upon consideration of the plaintiff's request for sanctions in connection with defendants' response to plaintiff's motion for partial summary judgment on the issue of truth, defendants' opposition thereto, plaintiff's reply and the entire record, the Court denies plaintiff's request for sanctions.

s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER FILED MAY 27, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 92-0711 TAF

ROBERT C. McFARLANE,

Plaintiff,

v.

ESQUIRE MAGAZINE, *et al.*,

Defendants.

ORDER

This matter comes before the Court on plaintiff's motion for partial summary judgment on the issue of truth and upon plaintiff's request for sanctions. Upon consideration of the plaintiff's motion for partial summary judgment, defendants' opposition, the reply thereto, and the parties oral arguments, it is this 27th day of May, 1993, hereby

ORDERED, that plaintiff's motion is denied; and it is further

ORDERED, that plaintiff's request for sanctions is denied.

s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

(2)

No. 95-1769

IN THE

Supreme Court of the United States

October Term, 1995

ROBERT C. McFARLANE,

Petitioner,

v.

ESQUIRE MAGAZINE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should review the dismissal of a libel action brought by a public figure who has failed to present any evidence of actual malice, much less the clear and convincing evidence of actual malice required by this Court.

PARTIES TO THE PROCEEDINGS

Petitioner Robert C. McFarlane was plaintiff in the District Court and appellant in the United States Court of Appeals for the District of Columbia Circuit.

Respondent Esquire, defendant and appellee below, is a magazine published by the magazine division of The Hearst Corporation, and has its principal place of business in New York, New York.

Respondent The Hearst Corporation, defendant and appellee below, is a corporation organized under the laws of Delaware, with its principal place of business in New York, New York. The Hearst Corporation owns and publishes Esquire.

Respondent Craig Unger, defendant and appellee below, was, at all times relevant to this action, a freelance journalist who wrote the article at issue in this case. At the times relevant to this action, Unger resided in New York, New York. He has never been an employee of Esquire or Hearst. He currently resides in Massachusetts.

RULE 29.6 LISTING

Respondent The Hearst Corporation has no parent companies or publicly-held, nonwholly owned subsidiaries.

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IN THE

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Respondents.

BRIEF IN OPPOSITION

The unanimous decision below reflects the straightforward application of three decades of carefully crafted constitutional law and settled jurisdictional principles. This accumulated wisdom prohibits recovery of damages for defamation based upon the publication of a veteran journalist's thoroughly researched account of allegations about a public figure made by a knowledgeable source, where the author uncovered no evidence to disprove the allegations and the article dealt candidly with the credibility of the source. This case presents no conflict in the circuits or departure from judicial precedent, or any other compelling reason to grant the Petition under Supreme Court Rule 10. The Petition should be denied.

STATEMENT OF THE CASE

A. Background

This libel lawsuit arises from a ten-page article (the "Article") prepared by an experienced magazine writer who investigated charges that surfaced throughout 1991 about the so-called "October Surprise" controversy — claims that the

1980 Reagan presidential campaign conspired to delay the release of hostages in Iran for political gain. The Article, published in the October 1991 issue of *Esquire* magazine, capsulized the work of a journalist who laboriously researched leads, reviewed mountains of books and articles, and conducted some 150 interviews in an attempt to analyze the then-known facts about the controversy. The Article included allegations from a former Israeli intelligence officer that Petitioner Robert McFarlane had a "special relationship" with Israeli intelligence, assisted the Israelis in tasking convicted spy Jonathan Pollard, and participated in key October Surprise events. Through this lawsuit, McFarlane, the former National Security Advisor who was convicted — and later pardoned — for misleading Congress about his role in the Iran-Contra scandal, seeks to recover damages for defamation based on the publication of these allegations.[1]

B. The Author's Investigation

The allegations of an October Surprise first captured the public's attention in April 1991, when *The New York Times* published an op-ed column by former National Security Council staff member Gary Sick suggesting that campaign operatives working for Republican presidential candidate Ronald Reagan had conspired to delay the release of American hostages. *See* Gary Sick, *The Election Story of the Decade*, N.Y. Times, Apr. 15, 1991. JA 721-22[2]. This astonishing report spawned a massive hunt by congressional investigators and

1. In a separate libel action, McFarlane has sued Ari Ben-Menashe and the publisher of Ben-Menashe's 1994 book, *Profits of War*, based on the publication of similar but more extensive allegations about McFarlane. McFarlane's lawsuit against Ben-Menashe, which was summarily dismissed by the District Court, is pending in the United States Court of Appeals for the District of Columbia Circuit. *See McFarlane v. Ben-Menashe, et al.*, No. 95-7201 (D.C. Cir.).

2. "JA" refers to the Joint Appendix submitted by the parties to the United States Court of Appeals for the District of Columbia Circuit. "DSA" refers to the Defendants/Appellees' (now Respondents) Supplemental Appendix submitted to the Court of Appeals. The District Court's opinion is referred to herein as "D. Ct. Op.," followed by a cite to the Appendix accompanying the Petition.

scores of journalists who, like the American public, were still struggling to comprehend the disclosures made during the Iran-Contra affair.

Along with numerous colleagues and congressional investigators, veteran journalist Craig Unger set out to examine the trail of the October Surprise.[3] His impressive roster of more than 100 sources included a number of high-ranking current and former government officials, including former Attorney General Elliot Richardson, former National Security Council staffer Sick, Admiral Bobby Ray Inman, and now Secretary of State Warren Christopher; congressional investigators, including then House Foreign Affairs Committee Chief Counsel Spencer Oliver; former Israeli government officials, including Brigadier General Avraham Bar'Am; and numerous journalists knowledgeable in Middle Eastern affairs and intelligence matters. JA 692-705.

One of Unger's many sources was former Israeli intelligence officer Ari Ben-Menashe. Unger recognized Ben-Menashe as an undeniably controversial figure, but also a rare find: a former spy who was familiar with sensitive state secrets and was willing to talk about them. Unger and Esquire understood that, during the previous decade, Ben-Menashe had been a primary source for the Iran-Contra scandal and other important pieces of the U.S.-Israeli intelligence mosaic. JA 700-03; DSA 1135-36. Unger and Esquire also knew that former government officials and reputable journalists — including Sick, Robert Parry, who reported for PBS's Frontline television program, and Seymour Hersh, the Pulitzer Prize-winning reporter — had used or were using Ben-Menashe as a source. JA 695-96; DSA 1135-36, 1273-74.

While Unger's three-month investigation was under way, Congress and the FBI also pursued Ben-Menashe's claims. JA 690-91. Spencer Oliver, then-Chief Counsel to the House Foreign Affairs Committee, interviewed Ben-Menashe several

3. Unger graduated from Harvard College with honors in 1971. He has written for publications including *The New Yorker, The New Republic, New York Magazine, Vanity Fair, The Washington Post,* and *The Los Angeles Times*. He currently serves as the Editor-in-Chief of *Boston* magazine.

times in Oliver's official capacity as a congressional investigator. JA 685, 690. The purpose of these interviews was to determine whether a congressional investigation should be launched into the possibility of an October Surprise. During these interviews, Ben-Menashe told Oliver that he was a former Israeli intelligence official who had been given access to Israeli intelligence and other secret information. He also repeated essentially the same allegations about McFarlane that he had told Unger, including the assertion that McFarlane was a paid agent of Israeli intelligence. JA 685-86.

Contacted by Unger, Oliver confirmed that — although he viewed Ben-Menashe with some skepticism — he "took seriously" Ben-Menashe's allegations and information, including the information about McFarlane. JA 685-86. He had "spotcheck[ed]" some of Ben-Menashe's allegations and concluded that "at least some of his information was knowledgeable." Oliver also informed Unger that "other staff members of [other] congressional committees" were in the process of exploring the same allegations, and confirmed that Ben-Menashe had linked McFarlane to Israeli intelligence. JA 686-87. Oliver told Unger that he had recommended that Congress investigate the charges more fully. JA 686-87, 703-04, 911.[4]

Oliver's disclosures prompted more legwork. Unger spoke with former Attorney General Richardson, who was part of the legal team for a company (Inslaw) that had submitted an affidavit to a federal court from Ben-Menashe. In the affidavit, Ben-Menashe claimed the McFarlane had a "special relationship" with a leading Israeli intelligence figure, Rafi Eitan, and had improperly provided Eitan with computer software for Israeli intelligence. JA 680-84, 700-01. Richardson told Unger that he took Ben-Menashe seriously and believed that Ben-Menashe "is who he says he is." JA 681, 701.[5]

Unger also found previously published accounts about McFarlane's meeting in 1980 in Tehran with Reagan supporter

4. These facts were confirmed by Oliver in an affidavit submitted to the District Court in this action. *See* JA 685-87.

5. These facts were confirmed by former Attorney General Richardson in an affidavit submitted to the District Court in this action. *See* JA 680-84.

Earl Brian to discuss the release of Western hostages, and the charges that McFarlane had been recruited into Israeli intelligence and was "Mr. X" in the Pollard case. JA 692-706, 913-14, 915, 917. When Ben-Menashe claimed that he was being interviewed by FBI agents about McFarlane's ties to Israel, Unger checked it out. Using the agent's home telephone number provided by Ben-Menashe, Unger contacted FBI agent Emmitt Cartinhour to explore Ben-Menashe's claim. Cartinhour told Unger that the FBI could not confirm or deny "active" investigations, leading Unger to believe that the FBI was investigating Ben-Menashe's charges. JA 334-35, 704-05.

McFarlane's role in some October Surprise-related events was undeniable, as Unger discovered. For instance, Unger was able to confirm, through several press reports, McFarlane's involvement in a September 1980 meeting at the L'Enfant Plaza Hotel in Washington where McFarlane and Reagan campaign officials met a foreigner to discuss possible contact with Iranian officials about the release of American hostages. JA 693-95; *see McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1305 (D.C. Cir. 1996). Based on everything Unger knew or believed at that time, it was entirely plausible to Unger that a man like McFarlane — who had been a central figure in the Iran-Contra affair, had cultivated undeniably close ties to Israel, and was well-schooled in the clandestine world of international espionage — might have had the "special relationship" with Israeli intelligence described by Ben-Menashe. JA 696, 699, 705-06, 921-22.

Unger's pursuit of the truth did not end there. As he prepared his article for Esquire, Unger tried to interview McFarlane, placing no less than five telephone calls to McFarlane's home and office over a two-month span. On June 11 and 12, 1991, he placed three calls to McFarlane and left messages each time, twice at McFarlane's home and once at his office. JA 169-70, 697-98, 953-55. On June 12, 1991, he faxed a letter to McFarlane requesting an interview about the October Surprise. That same day, McFarlane wrote back to deny the request for an interview, saying he "would be of little help." JA 176-79, 697, 956-57.

On August 8, 1991, Unger again phoned McFarlane at his home and office. He left a message with McFarlane's secretary that he wanted to talk to McFarlane "about the allegations made about him in the Inslaw case," which linked McFarlane to Israeli intelligence.[6] Despite being familiar with the Inslaw allegations, McFarlane never responded to this message or to any of Unger's calls. JA 697-98, 921-22, 950-52, 958-61. As the District Court properly concluded, "McFarlane did decline to be interviewed." D. Ct. Op. at 55a.

C. Esquire's Role

Esquire's role in the preparation of the Article began in the Spring of 1991, when Unger approached David Hirshey, then-Articles Editor of Esquire, about writing a profile of the newly appointed Ambassador to South Korea, Donald Gregg. DSA 1184-85; JA 171-72. Hirshey knew Unger to be a veteran, well-educated journalist who had written for numerous national publications and whose two previous articles for Esquire had been "exemplary." DSA 1189. *See also* DSA 1322, 1344-45; *McFarlane*, 74 F.3d at 1305. On May 21, 1991, Esquire and Unger executed a standard contract for the planned article. The contract granted Esquire the right to publish the piece, but Unger retained ownership and all intellectual property rights. JA 277.

In the course of researching his planned profile of Gregg, Unger became convinced that a comprehensive inquiry into the October Surprise held more promise as a magazine article. DSA 1081-83, 1185; JA 172. As Hirshey and Literary Editor Will Blythe recall, Unger requested that his article focus on the October Surprise, and they agreed. DSA 1089-90, 1185. Later that summer, Unger delivered a working draft of the Article to Esquire. DSA 1073-74. Although no one can recall which of the many drafts was first reviewed by Esquire edi-

6. Unger believed that McFarlane would understand the reference to Inslaw as implicating McFarlane's relationship with Israeli intelligence. JA 698-99. Unger testified that he did not leave a more explicit message about McFarlane's ties to Israeli intelligence because he did not know who would be conveying the message and he did not want to "embarrass" Mr. McFarlane. JA 167-68, 187.

tors, it is clear that five of the six sentences at issue in this lawsuit — the exception being "Both McFarlane and Brian declined comment" — were authored by Unger and present in the original draft delivered to Esquire. *See* DSA 1091-92, 1183. *Compare* JA 284 *with* JA 634, 639, 655, 662. The wording of these five sentences stayed the same throughout the editing process. In an early draft, the sentences were located closer to the end of the Article, but were moved forward when the narrative was organized chronologically. *See* DSA 1097. No substantive question was ever raised by any Esquire editor about these five statements. *See* DSA 1102-03, 1189-90, 1350-60.

By the time the Article appeared in the magazine, Hirshey, Blythe and Research Editor Mark Warren had made traditional editing decisions, including sharpening the prose and spotchecking some passages. *See, e.g.*, DSA 1182, 1199-1200, 1377-80. Esquire's editors were familiar with the "extraordinarily extensive" efforts that Unger had undertaken, had confidence in his work, and thus had no reason to independently attempt to verify each of the statements in the Article. *See* DSA 1102, 1134-36, 1189, 1352, 1357-59. And while the editors were aware that Ben-Menashe's credibility had its problems, they knew that he was consistently making the same accusations, and more, to other journalists and congressional investigators. DSA 1135, 1272-75, 1293-94.

The Esquire editors testified without contradiction that the following information — known to them prior to publication — stood out from the melange of material and gave Esquire the confidence to report Ben-Menashe's charges: (1) congressional investigators were taking Ben-Menashe seriously, (2) Ben-Menashe was one of the original sources for Iran-Contra, (3) former Attorney General Richardson relied on Ben-Menashe in the Inslaw case, and (4) Unger had failed to uncover any evidence disproving the reported allegations. DSA 1135-36, 1272-75, 1293-94.

D. Petitioner's Misstatements of Fact

In seeking review, Petitioner not only ignores the indisputable evidence that there was no actual malice on the part of any respondent, but misstates critical facts. He claims, with-

out record citations, that the author and publisher "acknowledged" or "knew" that Ben-Menashe was, alternatively, an "untruthful informant," a "known liar," a "notorious liar," or just a plain "liar." *See* Petition at i, ii, 4, 10, 11, 12, 18, 19, 25, 27, 29. This is wrong, and is clearly an attempt to bootstrap this case into the realm of inapposite actual malice decisions such as *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) where there was hard evidence that journalists published allegations of a known liar or disregarded information directly refuting a source's allegations.

Neither Unger nor Esquire ever "acknowledged" or "knew" that Ben-Menashe was a "liar," nor did they uncover *any* evidence contradicting Ben-Menashe's claims about McFarlane. On the contrary, the author stated unambiguously at his deposition that: "I never caught him [Ben-Menashe] in a lie and I tried. I tried to catch him in lies many, many times and I never did." JA 226. As one of the magazine editors explained: "We wouldn't have used him as a source unless we thought that he had some knowledgeability. . . . We also knew that he, Ari Ben-Menashe, was the source of the Iran-contra story, and certainly that had checked out, and also that Congress was investigating Ari Ben-Menashe's charges and using him as a witness." DSA 1134-35. *McFarlane*, 74 F.3d at 1304. And as then-Editor in Chief Terry McDonell added: "People with a great deal of intelligence resources were saying, he's [Ben-Menashe's] right or he is who he says he is." DSA 1293.

Further, Petitioner's contention that "Ben-Menashe's believability depends upon the endorsement of Elliot Richardson" (Petition at 7) also misstates the facts. Ben-Menashe's believability was supported by much more than just Richardson. As Unger knew, Oliver's interviews with Ben-Menashe prompted a call for a formal congressional inquiry. JA 685-86. Sick told Unger that he believed Ben-Menashe to be knowledgeable, and Parry and Hersh had used or were using Ben-Menashe as a source on the October Surprise and other intelligence-related stories. JA 210, 695-96.

Other sources interviewed by Unger were consistent. Former Israeli Brigadier General Avraham Bar'Am, while first questioning Ben-Menashe's bona fides, later conceded —

after a telephone call with Ben-Menashe — that Ben-Menashe was indeed knowledgeable. JA 496, 702. Richard Shears, a veteran journalist and correspondent for the *London Daily Mail* who was assisting Ben-Menashe with a book, told Unger: "Certainly on Ari's credibility, you know, we have absolutely no doubt whatsoever. . . . [Ben-Menashe's October Surprise scenario] is absolutely sensational and I have no doubt that it is true."[7] Although some of Unger's sources expressed surprise at the startling nature of the allegations about McFarlane, *not one provided evidence to contradict Ben-Menashe's allegations*. JA 159-60, 213-15, 221-22, 250, 702-03. *See* D. Ct. Op. at 54a.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW IS CONSISTENT WITH THREE DECADES OF PRECEDENT PROTECTING THE PUBLICATION OF STATEMENTS MADE WITHOUT ACTUAL MALICE IN A PUBLIC FIGURE LIBEL CASE.

More than thirty years of Supreme Court and circuit court precedent have solidified the principle that a plaintiff must show actual malice by clear and convincing evidence at the summary judgment stage. Petitioner, cognizant that he has *no* evidence of actual malice sufficient to meet this standard, asks this Court to overrule *New York Times v. Sullivan* and its progeny. While this wistful request may be candid, the Court should decline Petitioner's invitation to dislodge decades of American libel law.

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7. *See* Exhibit 69 to Defendants' Motion for Summary Judgment filed with the District Court at Document No. 2811-12.

A. The Lower Court Properly Applied The Law Of Actual Malice In Affirming Summary Judgment.

By using rhetorical "shield" concepts which Petitioner claims were invented from whole cloth by the Court of Appeals, Petitioner attempts to accomplish by advocacy what he cannot do with hard evidence: namely, demonstrate clearly and convincingly that respondents published a false statement of fact with a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), or "entertained serious doubts as to the truth of [the] publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or acted with "purposeful avoidance of the truth." *Connaughton*, 491 U.S. at 692.

The Court of Appeals did not fashion any "special rules" (Petition at 29) in affirming summary judgment for respondents. Nor did its decision conflict with that of *any* other circuit. Rather, the Court of Appeals, and the District Court, took painstaking looks at the evidence presented by Petitioner and, drawing from leading Supreme Court and appellate court decisions, came to the unremarkable conclusion that Petitioner's evidence did not add up. Indeed, it is Petitioner's reliance on journalism criticism rather than evidence of a "high degree of awareness" of probable falsity that permeates his Petition. *See Garrison*, 379 U.S. at 74. But, of course, courts "do not sit 'as some kind of journalism review seminar offering our observations on contemporary journalism and journalists.'" *Tavoulareas v. Piro*, 817 F.2d 762, 796 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987) (citation omitted).

While Esquire's journalism may be a target for criticism, so too are the subsequent efforts to assess whether an October Surprise occurred. Even the two-year, multi-million dollar congressional investigation which rejected the October Surprise theory (*see McFarlane*, 74 F.3d at 1298-99) was harshly

criticized in some circles as a whitewash.[8] In any event, the actual malice standard requires evidence, not criticism, to propel a public figure libel case past the summary judgment stage.[9] The only evidence in this case shows that Esquire never tried to conceal the issue of Ben-Menashe's credibility from its readers, and never had serious doubts about Ben-Menashe's statements.

1. Reliance On A Veteran Journalist And His Thorough Research Does Not Constitute Actual Malice.

The uncontradicted evidence indicates that the Esquire editors relied on Unger for the substantive research and accuracy of the Article. As Research Editor Mark Warren explained in his deposition, "Mr. Unger had done an extraordinarily extensive job of reporting the story," and therefore there was no reason for Esquire to independently

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8. *See, e.g.*, Robert Parry, *October Surprise X-Files*, The Consortium, Dec. 21, 1995 at 6, where the author, after an independent review of both classified and unclassified documents left behind by the House Task Force, concluded that "[t]he boxes of documents revealed that the task force used false alibis on [former CIA Director William] Casey's whereabouts for key October Surprise dates; withheld relevant documents and testimony that clashed with its conclusions; dismissed credible witnesses who supplied unwelcome support for the allegations; and accepted dubious — if not blatantly false — testimony from Republicans." "[T]he dismissive House task force report," writes Parry, "effectively buried the October Surprise story as an historical issue." *Id.* at 4.

Of course, the October Surprise Task Force's conclusion, even if credited today, is irrelevant to the actual malice determination in this case, for actual malice may be analyzed only as of the time of publication. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964).

9. The caliber of Petitioner's actual malice evidence is best illustrated by his suggestion that Esquire's publication of a "picture of a sexily dressed woman" — instead of using the space to include "less cleavage" and more words from an ambiguous quote from Elliot Richardson — constitutes clear and convincing evidence of actual malice. *See* Petition at 15 n.4. The "sexily dressed woman" was, in fact, a model in an advertisement for Piper-Heidsieck champagne that was published above the text of two pages of the Article. Petitioner's "cleavage" theory of actual malice is even more fanciful than other impermissible attempts to intrude on a publisher's editorial discretion. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

attempt to verify each of the statements in the Article. DSA 1352, 1357-58. Other editors echoed the same sentiment. DSA 1102, 1189, 1299, 1304. This type of reliance on the writer does not constitute actual malice. *McFarlane*, 74 F.3d at 1304-05. *See Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309, 1319 (7th Cir. 1988) (" 'for purposes of constitutional malice, [the magazine's] editors were under no obligation to check [the writer's] facts at all' ") (citation omitted).

Consistent with the widely-accepted practice in the magazine industry, Esquire editors did not review all of the materials that Unger gave him, but simply spotchecked *portions* of the Article. *See* DSA 1329, 1334, 1339, 1341, 1358, 1388, 1405. There was no evidence that any employee of Esquire was aware of any information contradicting Ben-Menashe's claims about McFarlane. On the contrary, Esquire knew that Ben-Menashe was making similar claims to congressional investigators and others.[10] Even assuming that proof of falsity exists somewhere in the documents that Unger provided, which it does not, there remains an absence of proof that any employee of Esquire was aware of the information or purposefully avoided it. *See Connaughton*, 491 U.S. at 665 (even "extreme departure" from accepted journalistic standards is not actual malice); *St. Amant*, 390 U.S. at 733 ("failure to investigate" is not actual malice).[11]

10. *See, e.g.*, testimony of Literary Editor Will Blythe at DSA 1135 ("We also knew that . . . Congress was investigating Ari Ben-Menashe's charges and using him as a witness.").

11. *See also Harris v. Quadracci*, 48 F.3d 247, 253 (7th Cir. 1995); *Tavoulareas*, 817 F.2d at 797; *Washington Post Co. v. Keogh*, 365 F.2d 965, 972-73 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967); *Saenz v. Playboy Enterprises, Inc.*, 653 F. Supp. 552, 572 (N.D. Ill. 1987), *aff'd*, 841 F.2d 1309 (7th Cir. 1988); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 821-22 (N.D. Cal. 1977).

The record also is barren of any evidence that *Unger* prepared the Article with a subjective awareness of probable falsity.[12] Petitioner nonetheless attacks the Court of Appeals' unwillingness to examine Unger's state of mind based on its ruling — consistent with other circuits — that Unger's conduct cannot be imputed to Esquire because (a) he was not an employee of the magazine, and (b) there was no evidence that Esquire supervised "the *process* by which Unger turned raw data into finished article (as distinct from control over his final product) . . . ." *McFarlane*, 74 F.3d at 1303. Petitioner overlooks the consensus among the circuits that evidence of an independent contractor's actual malice cannot be imputed to the publisher except under the doctrine of *respondeat superior*. *See id.* at 1302; *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1446 (8th Cir. 1989), *cert. denied* 493 U.S. 1036 (1990); *Hunt v. Liberty Lobby*, 720 F.2d 631, 648-49 (11th Cir. 1983).

12. The Court of Appeals seemed to suggest vaguely that there might be some evidence of actual malice as to Unger, though it did not explain this comment. *See McFarlane*, 74 F.3d at 1301 ("as we shall see"). Later in its decision, the Court characterized the telephone message Unger left with McFarlane's office in August 1991 as "apparent[ly] misleading" because his message did not include words such as "By the way, I plan to accuse you of being an Israeli spy." *Id.* at 1307. Yet the record does not support this criticism. Unger reasonably believed that, by asking to speak to McFarlane about "the allegations made about him in the Inslaw case," (JA 697) McFarlane would know what Unger meant, since McFarlane was already familiar with Ben-Menashe's Inslaw affidavit and its allegations that he had a "special relationship" with a leading Israeli intelligence figure and had improperly sold computer software to Israeli intelligence. JA 697-99, 921-22, 950-52, 958-61. Unger also explained that he did not leave a more precise message because he did not want to embarrass McFarlane by conveying detailed accusations to a telephone receptionist. JA 167-68, 187.

Of course, even if McFarlane *had* spoken to Unger and *had* denied the allegations, that still would not be enough to establish actual malice on the part of Unger or Esquire, for

> the press need not accept "denials, however vehement; such denials, are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error."

Connaughton, 491 U.S. at 691-92 n.37, *quoting Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977). *See McFarlane*, 74 F.3d at 1307-08.

Instead, he analogizes to the appellate decision in *Gertz*, but fails to recognize that the control over the editorial product exercised by the publisher in *Gertz* is not present here. *See Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983). In *Gertz*, the publisher "conceived of a story line," solicited a writer with a "known and unreasonable propensity to label persons or organizations as Communist," provided the author with background material, "added further defamatory material based on [the author's] 'facts,'" and otherwise exercised "significant control . . . over the content and focus of the article." *Gertz*, 680 F.2d at 539, 539 n.19. Here, by contrast, Unger approached Esquire with a story idea, proposed a change in focus of the article to Esquire editors, conducted his own three-month independent investigation into the facts, and wrote — with one exception — all of the sentences at issue in this case without any substantive change made by the editors. Given their faith in Unger's credentials and abilities, the Esquire editors felt no need to "re-report" the article, and did not do so. DSA 1102, 1134-36, 1189, 1352, 1357-59.

It would turn actual malice on its head to adopt a standard that would impose liability upon a publisher for refining an investigatory piece of journalism, absent clear and convincing proof that the publisher exercised direct control over the writing process or that the publisher itself unearthed flatly contradictory information, which did not occur here. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731. Far from serious doubts, the record in this case shows that the editors had *no* doubts about publishing Unger's work given the depth of his research and reporting, their knowledge of his reputation, and their awareness of Ben-Menashe's statements to congressional investigators and others. *See, e.g.*, DSA 1102, 1134-36, 1189, 1272-75, 1293-94, 1352, 1357-59.

2. Questions About A Source's Credibility Do Not Prove Actual Malice.

Petitioner's continuing attack on the Esquire editors' assessment of Ben-Menashe's credibility reveals a fundamental misunderstanding as to both the nature of news reporting and the basic premise of American libel law. Actual malice, of course, depends on the defendant's state of mind at the time of publication, or, in other words, after the reporting process has essentially been completed. *See Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 512 (1984). Neither Unger nor Esquire ever tried to hide lingering questions about Ben-Menashe. Esquire informed the readers in no uncertain terms that Ben-Menashe had his detractors, quoting two journalists and a former CIA official who described Ben-Menashe as "a fake," "a liar," and a "nasty fuck." JA 289.

At the same time — relying on the statements of, among others, a former United States Attorney General (Richardson), a former National Security Council official (Sick), a former Chief Counsel of the House Foreign Affairs Committee (Oliver), a former Pulitzer Prize winner (Hersh), another respected journalist (Parry), and a former Israeli Brigadier General (Bar'Am) — Esquire pointed out that Ben-Menashe was "almost impossible to dismiss." JA 289, 692-705; DSA 1135-36, 1273-74. Esquire's candid treatment of Ben-Menashe's credibility in the Article evinces the exercise of careful editorial judgment, not reckless disregard for the truth. *McFarlane*, 74 F.3d at 1304 ("[F]ull (or pretty full) publication of the grounds for doubting a source tends to rebut a claim of malice, not to establish one."). *See Tavoulareas*, 817 F.2d at 788 n.35; *Edwards*, 556 F.2d at 120; *Secord v. Cockburn*, 747 F. Supp. 779, 793 (D.D.C. 1990) ("the mere fact that divided opinion exists among reporters as to the credibility of an individual does not reflect on the defendant's state of mind and actual malice").

Unable to refute the endorsements of numerous other sources, Petitioner focuses only on the purportedly "fabricated endorsement" by Richardson of Ben-Menashe's credibility. Petition at 7. In particular, Petitioner takes issue with the decision not to include the clause "Quite apart from what he

knows" among Richardson's quotations. Petition at 7-8. The editors, however, testified uniformly that the decision not to include that clause was driven by space considerations, coupled with their belief that deleting the clause would not materially change the meaning of the quotation, as the Court of Appeals so found. DSA 1136-37, 1214-16, 1281-82, 1398-99; *see McFarlane*, 74 F.3d at 1306-07. True to form, Petitioner's argument completely ignores the affidavit Richardson submitted to the District Court in this action, where Richardson said, "[t]he statements and quotations attributable to me [in the Article] accurately reflect statements I made to Mr. Unger, and accurately reflect my views of Mr. Ben-Menashe." JA 680-82. Richardson's affidavit goes beyond merely supporting a defense of truth (*see McFarlane*, 74 F.3d at 1306); it validates Esquire's editing of his comments about Ben-Menashe. *See* D. Ct. Op. at 57a. Contrary to Petitioner's claim that Esquire somehow altered the gist of Richardson's sentiments in its editing process, Richardson himself has recognized under oath that the Article accurately portrayed his view of Ben-Menashe as being "who he says he is." JA 680-82.[13]

Even if Petitioner could show some kind of careless editing mistake by Esquire, which he cannot, he still would fall far short of proving actual malice. Actual malice is not imprecise or inartful writing, or careless editing that results in an implication that the writer or editors did not perceive. *Newton v. National Broadcasting Co.*, 930 F.2d 662, 680-81, 685-86 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991); *Hutchinson v. Proxmire*, 431 F.

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13. Equally unpersuasive is Petitioner's argument that Esquire "fabricated" the statement that McFarlane declined comment. Petition at 17. The uncontradicted testimony proves that the editors changed the sentence from "McFarlane . . . denied the charges" to "McFarlane . . . declined comment" in an effort to be more precise and to "more accurately reflect [McFarlane's] response . . . at that time." DSA 1128-30. As Articles Editor Hirshey explained:

> All along [the Esquire editors] were holding space for comments from Mr. McFarlane and Mr. Brian, and at this stage we were near the end of the editing process and Mr. Unger reported that none of his phone calls or his letter had been answered. So . . . we changed the language . . . .

DSA 1210-11. *See McFarlane*, 74 F.3d at 1307.

Supp. 1311, 1329 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979). Nor is it reliance on a single source, or reliance on a biased source. *St. Amant*, 390 U.S. at 730, 733; *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 716 (4th Cir.), *cert. denied*, 501 U.S. 1212 (1991); *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491, 1498 (11th Cir. 1988); *New York Times Co. v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966). Actual malice is not taking an "adversarial stance" or "express-[ing] a point of view." *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 601 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1010 (1989); *Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 627 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988); *Tavoulareas*, 817 F.2d at 795. All of these arguments were properly rejected by an appellate court that sifted through the voluminous record and dutifully applied precedent:

> In sum, given Ben-Menashe's supposed role as a source in Iran-Contra, Unger's reputation with Esquire, and the inherent difficulties in verifying or refuting a claim that someone is the agent of a foreign power, the proofs do not add up to the possibility of a reasonable jury finding of clear and convincing evidence of reckless awareness of probable falsity, and in no way show an actual belief in falsity.

McFarlane, 74 F.3d at 1305.

B. The Lower Court Properly Held That Personal Jurisdiction Could Not Be Asserted Over The Author.

In challenging the Court of Appeals' determination that the District Court could not assert personal jurisdiction over Unger, Petitioner asks the Court to overturn a decision by Congress to separate the distinct principles of "act" and "injury" in tort actions. But as Judge Bork noted in *Moncrief v. Lexington Herald-Leader Co.*, 807 F.2d 217 (D.C. Cir. 1986), D.C. Code § 13-423(a)(3) is a

> "precise and intentionally restricted tort section," which "stops short of the outer limits of due process," and which confers jurisdiction only over a defendant who commits an act in the District which

> causes an injury in the District, without regard to any other contacts.[14]

Moncrief, 807 F.2d at 221, *quoting Margoles v. Johns*, 483 F.2d 1212, 1219 (D.C. Cir. 1973) and *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1088 (S.D.N.Y. 1984). *See McFarlane*, 74 F.3d at 1300 (McFarlane's claim "would obliterate subsection (3)'s careful distinction between 'injury' and 'act'."). The statute at issue, which was chosen by Congress over two other proposals, is "one of 'moderate reach,' [that] reflected an intention to 'separate "act" from "injury," granting jurisdiction over nonresidents who by their out-of-state acts or omissions cause tortious injury within the state only where additional minimum contacts with the state are also present.'" *Moncrief*, 807 F.2d at 219-20, *quoting Margoles*, 483 F.2d at 1216.

In creating the statute, Congress did not create "special procedural protections" just for libel suits. *See* Petition at 28. On the contrary, the statute applies to *all* tort actions:

> [A]t minimum two actions are necessary for the tort of slander — one individual must act in speaking the words of defamation while another must act in hearing them to the injury of a third party. *This is no different from almost any tort, however, for more than one action is nearly always necessary to give rise to a cause of action.*

Margoles, 483 F.2d at 1217 (emphasis added).

Petitioner's argument boils down to a simplistic theory of jurisdiction by association, where any defendant would have to answer claims of libel anywhere the offending material is published by anyone. This Court has repeatedly disavowed similar theories of vicarious jurisdiction. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("Each defendant's contacts with the forum State must be assessed individually."); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Jurisdiction under D.C. Code § 13-423(a)(3) requires specific proof of a tortious act or omission in the District, as the District of Columbia courts have agreed. *See Moncrief*, 807 F.2d at 221; *Margoles*, 483 F.2d at 1218-19; *Akbar v. New York Magazine Co.*, 490 F. Supp. 60, 63 (D.D.C. 1980).[15]

Petitioner wrongly argues that this Court should overrule established caselaw because *Keeton* defines libel "generally" to occur "wherever the offending material is circulated." First, *Keeton* construed a New Hampshire statute with a different framework. *Moncrief*, 807 F.2d at 221 (statute applied if defendant "'commits a tort in whole or in part in New Hampshire'") (citation omitted). As Judge Bork noted in *Moncrief*, the New Hampshire statute in *Keeton* and the California statute in *Calder v. Jones* extend jurisdictional boundaries to the outer limits permitted by the Due Process Clause. The District of Columbia statute, of course, does not. *Compare Moncrief*, 807 F.2d at 221, 223 *with Calder v. Jones*, 465 U.S. 783, 786 n.5 (1984); *Keeton*, 465 U.S. at 774. Second, neither *Keeton* nor *Calder* involved the issue of jurisdiction over a freelance author. Indeed, *Keeton* considered only the jurisdictional reach over publishers, and strongly cautioned that the same analysis did not necessarily apply to other defendants. *Keeton*, 465 U.S. at 781 n.13.

Far from engaging in a "metaphysical parsing" (Petition at 28) of the District of Columbia statute, the Court of Appeals rightly avoided "delv[ing] into a magical mystery tour" (*Margoles*, 483 F.2d at 1218) of asserting jurisdiction in a manner prohibited by the plain language of the statute.

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14. Petitioner has waived his claims that personal jurisdiction over Unger was proper pursuant to D.C. Code § 13-423(a)(1) and § 13-423(a)(4). *See McFarlane*, 74 F.3d at 1300-01; Petition at ii, 27-28. Accordingly, an inquiry into Unger's contacts with the District of Columbia is not before this Court. Of course, Unger was a freelance writer who did not publish or circulate the magazine.

15. For a writer, the act of publication occurs where he or she writes, not where the writing ultimately alights. *See, e.g., Crane v. Carr*, 814 F.2d 758, 761 (D.C. Cir. 1987); *Moncrief*, 807 F.2d at 220-21; *Reuber v. United States*, 750 F.2d 1039, 1049-50 (D.C. Cir. 1984); *Tavoulareas v. Comnas*, 720 F.2d 192, 193-94 (D.C. Cir. 1983); (JA 1007-08).

CONCLUSION

This case has run its course. Two courts have carefully examined the ample record — including transcripts of nearly a dozen depositions of Esquire personnel and thousands of pages of Unger's interview notes — and found insufficient evidence of actual malice. In so doing, the lower courts have repeatedly rejected Petitioner's mercurial blend of advocacy, invective and literary criticism, and ignored his plea to lower or remove the bar of actual malice to suit his case.

The bar was carefully calibrated at its current height more than thirty years ago to protect the freedom to speak about public affairs and public officials — the very speech Petitioner seeks to punish in this case. This Court should resist Petitioner's invitation to turn back the clock for his convenience to the days before *New York Times v. Sullivan*, when the publication of a controversial statement about a public official was an occupational hazard rather than a constitutionally-protected activity.

Respectfully submitted,

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